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No. 94-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

NICHOLAS L. BIANCO, LOUIS R. FAILLA,
GAETANO J. MILANO and FRANK A. PUGLIANO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDICES A-G

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QUESTIONS PRESENTED

1. Are the good faith exceptions to the Fourth Amendment's exclusionary rule applicable to Title III's statutory exclusionary rules, 18 U.S.C. §§ 2515, 2518(10)(a)?

2. Do the "roving bug" provisions of Title III, 18 U.S.C. §2518(11)(a), violate the particularity requirements of the Fourth Amendment?

3. May an affidavit which is not incorporated into and attached to a search warrant cure a fatal defect in that warrant?

4. May the government deprive defendants of standing by violating "non-central" provisions of Title III, and are Fourth Amendment limitations on standing applicable to Title III's standing requirements, 18 U.S.C. § 2510(11)?

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[1] **LIST OF ALL PARTIES**

The caption of the case in this court contains the names of all parties to this petition. Seven co-defendants, including the four Petitioners, appealed their convictions to the Second Circuit. Petitioners believe that Americo Petrillo, Louis Pugliano and Salvatore D'Aquila, Jr., no longer have an interest in the outcome of the proceeding in this Court.

REASONS FOR GRANTING THE WRIT 20

1. Whether courts may incorporate Fourth Amendment "good faith" exceptions into Title III's exclusionary rules presents a question on which the courts of appeals are in conflict; the Court of Appeals' decision here violated settled precedent of this court and constituted improper judicial legislation in an important area of law controlled by Congress. . . . 20

2. Whether the "roving bug" provisions of 18 U.S.C. §2518(11)(a) violate the Fourth Amendment is an important question of federal law which has not been but should be settled by this Court. 32

3. There exists among the courts of appeals a square and irreconcilable conflict concerning the question of whether an affidavit which is not incorporated into and attached to a search warrant can cure a fatal defect in that warrant. 43

4. Where, as here, the government's violations of Title III operated to deny Petitioners Bianco and Pugliano standing and where the Second Circuit has improperly equated Title III and Fourth Amendment standing requirements, this case presents an important question of federal law which should be decided by this Court. 52

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NICHOLAS L. BIANCO, LOUIS R. FAILLA, GAETANO J. MILANO AND FRANK A. PUGLIANO respectfully petition this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit upholding petitioners' convictions for racketeering and related offenses.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is published as United States v. Bianco, 998 F.2d 1112 (2nd Cir. 1993). It is Appendix A to this petition. The orders of the court of appeals denying Mr. Milano's and Mr. Failla's petitions for panel rehearing and for rehearing in banc are Appendices B and C. The order

denying Mr. Bianco's petition for rehearing is Appendix D. The memorandum and order of the Connecticut District Court judge, denying petitioners' joint motions to suppress electronic surveillance on the "roving bug" issue, and the order authorizing the surveillance, are Appendices E and F. The memorandum and order of the Connecticut District Court judge, denying Petitioner Failla's separate motion to suppress based on the search of his home, is Appendix G. The memorandum and order of a Massachusetts District Court judge in a related case, incorporated into the Connecticut judge's "roving bug" rulings here, is published as United States v. Ferrara, 771 F. Supp. 1266 (D. Mass. 1991) and is reproduced in a separate volume as Appendix H.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit affirming petitioners' convictions for racketeering offenses was entered on July 19, 1993. The Court of Appeals' Orders denying Mr. Milano's and Mr. Failla's petitions for rehearing were entered on September 20, 1993. Its Order denying Mr. Bianco's petition for rehearing was entered on October 7, 1993. By Order dated December 8, 1993, under Docket No. A-465, Justice Thomas granted petitioners' timely filed application for an extension of time within which to file this petition for writ of certiorari, to and including February 4, 1994.

Petitioner invokes this court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. 90-351, codified at 18 U.S.C. §§ 2510-2521, as amended by Pub. L. No. 99-508 (1986), provides, in pertinent part:

§ 2510. Definitions.

(11) "aggrieved person" means a person who was a party to any intercepted ... oral ... communication or a person

against whom the interception was directed ....

§ 2515. Prohibition on use as evidence of intercepted. . . oral communications.

Whenever any ... oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial ... in or before any court of the United States ... if the disclosure of that information would be in violation of this chapter.

§ 2518. Procedure for interception of ... oral communications.

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including . . . (ii) except as provided in subsection (11), a particular description of the nature

and location of the facilities from which or the place where the communication is to be intercepted ...

* * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that--

* * *

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

* * *

(10)(a) Any aggrieved person in any trial ... before any court ... of the United States ... may move to suppress

the contents of any ... oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that--

(i) the communication was unlawfully intercepted ... .

* * *

(11) The requirements of subsections (1)(b)(ii) and (3)(d) of this section relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply if --

(a) in the case of an application with respect to the interception of an oral communication --

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and

(iii) the judge finds that such specification is not practical; and

(b) in the case of an application with respect to a wire or electronic communication --

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicants makes a showing of a purpose, on the part of that person, to thwart interception by changing facilities; and

(iii) the judge finds that such purpose has been adequately shown.

STATEMENT OF THE CASE

The opinions below contain all the facts and rulings relevant to the issues presented in this petition. A1-A88, A93-A101, A115-129, A130-399. We summarize those facts and rulings here.

This petition arises from a racketeering case which focused on the activities of the Patriarca family of La Cosa Nostra (LCN). By superceding indictment returned on December 7, 1990, in the United States District Court for the District of Connecticut, Petitioners and seven other individuals were charged with various racketeering offenses based on their LCN association. The district court's jurisdiction was properly invoked under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses.

A simultaneous prosecution proceeded against other defendants on similar grounds in the United States District Court for the District of Massachusetts.

A principal pre-trial issue in both prosecutions was the admissibility of a

tape recording of an LCN induction ceremony in Medford, Massachusetts, on October 29, 1989. That recording had been obtained through a "roving bug" warrant, authorized by a 1986 amendment of Title III and permitting the government--under limited circumstances--to obtain an electronic surveillance warrant without specifying the place or time when interceptions would occur.

The "roving bug" warrant issued here targeted the communications of three of the Massachusetts defendants--Russo, Ferrara and Carrozza--and named additional persons, including all four of the present Petitioners, as targets of the overall investigation. A102-A105. The recording of the ceremony captured the voices of Petitioners Milano and Failla but not those of Bianco or Pugliano.

Motions to suppress the recording were filed in both Massachusetts and Connecticut cases.

On April 15, 1991, the Massachusetts District Court, after evidentiary hearings, found the "roving bug" provision of Title III constitutional. A197-A275, 771 F.Supp. at 1281-1296.

The District Court further found that the government had broken the law in applying for the "roving bug" warrant here in two respects: (1) it failed to disclose facts showing "that it had probable cause to believe that the conversations it wanted to intercept would occur on a particular date, October 29, 1989, and at a particular location, 34 Guild Street," in violation of the "full and complete statement" requirement

of 18 U.S.C. § 2518(11)(a)(ii);[2] and (2) it failed to disclose prior Title III applications for surveillance of Petitioners Milano and Bianco, in violation of 18 U.S.C. § 2518(1)(e). A132-A188, A369-A377; 771 F.Supp. at 1270-1280, 1314-1315.

Because of these disclosure violations, the District Court ruled:

> The roving intercept provisions of Title III, and their constitutionality, rely in meaningful measure on an independent judicial officer, rather than a law enforcement officer engaged in the competitive business of combatting crime, deciding that it is reasonable, necessary, and appropriate to relax the usual particularity requirements of the statute. [Citation omitted.] The court in this case did

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[2]The government continued to withhold this information--which showed that it had had probable cause to obtain an ordinary Title III warrant--from the court and the defense until well into the suppression hearings. The District Court found the government's continuing "lack of candor ... disturbing." A335-A336, 771 F.Supp. at 1308.

not have an opportunity to make the fully informed decision on this issue which § 2518(11)(a) contemplates. A332; 771 F.Supp. at 1307, emphasis added.

The Massachusetts District Court nonetheless ruled the tapes admissible by grafting onto Title III's statutory exclusionary rules the "good faith" exceptions to the Fourth Amendment exclusionary rule announced in Franks v. Delaware, 438 U.S. 154 (1978) and United States v. Leon 468 U.S. 897 (1984). 771 F.Supp. 1304-1305, A317-A318.

On April 19, 1991, the Connecticut District Court ruled the tapes admissible in the Connecticut cases, adopting the Massachusetts judge's findings of fact and conclusions of law. A93-A101.

A separate pre-trial issue, relevant to Petitioner Failla alone, concerned federal agents' search of his residence.

Failla moved to suppress all items seized during the course of that search on the grounds that the warrant authorizing the search failed to describe the property to be seized with sufficient particularity. After a hearing, the District Court denied the motion, finding the requisite particularity in the description of the items to be seized. A115-A129.

Petitioners' jury trial began on April 17, 1991, and ended with verdicts on August 8, 1991. The government's central proof of the existence of the racketeering enterprise--the Patriarca family of La Cosa Nostra--was its tape recording of the LCN induction ceremony. Further, statements made by Petitioners Milano and Failla at the event were played for the jury and offered to prove specific racketeering acts charged in the

indictment. A number of items seized from the Failla residence were also introduced.

All petitioners were convicted of belonging to a RICO conspiracy in violation of 18 U.S.C. § 1962(d) and of related RICO substantive charges under 18 U.S.C. § 1962(c). Petitioners Milano and Failla were each convicted of one substantive violation of 18 U.S.C. § 1959, prohibiting violent crimes in aid of racketeering, and Petitioners Milano and Pugliano were also convicted of conspiracy to commit this offense. Pugliano and Failla were convicted of wire fraud in violation of 18 U.S.C. § 1343.

After sentencing on November 26, 1991, all Petitioners claimed a timely appeal. By opinion dated July 19, 1993,

the Second Circuit affirmed Petitioners' convictions.

Addressing the constitutionality of the roving bug statute, both on its face and as applied here, the Second Circuit acknowledged that a literal reading of the Fourth Amendment would forbid the warrant issued here, which failed to particularize the time and place for the search; but it then rejected "the narrow shackles that might otherwise flow from a literal reading of the Fourth Amendment." Instead, the court held this provision of Title III constitutional under a "relaxed particularity standard" appropriate for organized crime members who attempt to thwart surveillance. Relying on the statute's several protections against governmental abuse of the "roving bug" and on the "grave law enforcement

purposes underlying § 2518," the court concluded that the "roving bug" provision permits "no greater invasion of privacy than is necessary." A53-A65; 998 F.2d at 1120-1124.

Addressing whether the tapes should have been suppressed because of the government's violations of Title III, the Second Circuit held that Title III's statutory exclusionary rules, like the Fourth Amendment, are not to be read literally. Instead, they should be construed to include the judicially-crafted Franks exception, permitting evidence obtained in violation of Title III's disclosure provisions to be used at trial where the violations were not made "knowingly and intentionally, or with reckless disregard for the truth." A65-A76; 998 F.2d at 1124-1126.

While agreeing that Petitioners Milano and Failla had standing to challenge the tapes under Title III, since their voices were among those captured, the Second Circuit did not quote or discuss the statutory language relied upon by Pugliano and Bianco, which confers standing on "any. . .person against whom the interception was directed." 18 U.S.C. §§ 2510(11), 2518(10)(a). Pugliano and Bianco had argued that since they were named in the government's "roving bug" application as persons about whom the government hoped to obtain evidence, the express language of Title III conferred standing on them. The Second Circuit ruled that statutory standing under Title III is synonymous with judge-made rules of standing under

the Fourth Amendment. A49-A52; 998 F.2d at 1122.

On the search of Failla's home, the Court of Appeals agreed that the descriptions of the items to be seized in the warrant itself were fatally overbroad. A8-A18; 998 F.2d at 1115-1116. It held, however, that this defect in the warrant could be cured by the affidavit supporting the warrant, even though that affidavit was not incorporated into or attached to the warrant. A18-A22; 998 F.2d at 1116-1117.

REASONS FOR GRANTING THE WRIT

1. Whether courts may incorporate Fourth Amendment "good faith" exceptions into Title III's exclusionary rules presents a question on which the courts of appeals are in conflict; the Court of Appeals' decision here violated settled precedent of this court and constituted improper judicial legislation in an important area of law controlled by Congress.

The courts of appeals are in conflict on whether a judicially-crafted good faith exception, derived from Fourth Amendment jurisprudence, can be applied to Title III's statutory exclusionary rules.

Here, without any inquiry into whether Congress intended such an exception, the Second Circuit affirmed the District Court's adoption of "the good faith prong of the Franks test" as an exception to Title III's exclusionary rules. A69-A72, A311-A319. Yet several years earlier, a different panel of the

same court refused to incorporate the Fourth Amendment good faith exception announced in United States v. Leon, 468 U.S. 897 (1984) into a state wiretap statute, after careful statutory construction. United States v. Spadaccino, 800 F.2d 292, 296 (2nd Cir. 1986).[3]

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[3]The Second Circuit here did not address the applicability of the Fourth Amendment good faith exception announced in United States v. Leon, 468 U.S. 897 (1984) to Title III's exclusionary rules. The District Court below found Leon applicable, A276-A284,

Other District Courts have sharply disagreed, further demonstrating the lack of coherence on this important issue throughout the federal system. United States v. Ward, 808 F.Supp. 803, 807-808 (S.D.Ga. 1992); United States v. McGuinness, 764 F.Supp. 888, 897, n.2 (S.D.N.Y. 1991); United States v. Orozco, 630 F.Supp. 1418, 1521-22 (S.D.Cal. 1986); City of Oakland by Kuhn v. City of Detroit, 610 F.Supp. 364, 369, n.10 (D.Mich. 1984).

(continued...)

In conflict with the Second Circuit's ruling here, the First Circuit refused to incorporate into Title III's exclusionary rules an analogous good faith exception derived from Fourth Amendment law: the "innocent recipient" exception set forth in United States v. Jacobsen, 466 U.S. 109, 113-118 (1984). United States v. Vest, 813 F.2d 477, 481-482 (1st Cir. 1987).

The application of another analogous Fourth Amendment exception to Title III's exclusionary rules resulted in a split decision in the Sixth Circuit. In United

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[3](...continued)
Several state courts have refused to apply Fourth Amendment good faith exceptions to state statutory exclusionary rules. State v. Garcia, 547 So.2d 628, 629 (Fla. 1989); Chan v. State, 552 A.2nd 1351, 1360 (Md.App. 1989) (dictum). See also, Id. at 1358 (dictum: Title III exclusionary rule "invulnerable to good faith exception").

States v. Baranek, 903 F.2d 1068 (6th Cir. 1990), a majority of the panel incorporated a good faith "plain hearing" exception into Title III, based on a novel permutation of Coolidge v. New Hampshire, 403 U.S. 443 (1971). Citing "the usual Fourth Amendment calculus," the majority ruled that Title III did not require suppression where violations of a wiretap order were "inadvertant" and committed by "government agents ... charged with no wrongdoing." 903 F.2d at 1071-1072. The dissenting justice disagreed, urging strict construction of Title III's exclusionary rule. Id. at 1072-1073 (Jones, J., dissenting).

The commentators, too, sharply disagree on whether Title III's exclusionary rules include a good faith exception. Clifford S. Fishman, Wiretap-

ping and Eavesdropping § 253 (Supp. 1993) (good faith inapplicable); James G. Carr, The Law of Electronic Surveillance, § 6.3A (1993) (good faith applicable).

The proper approach is not to read any judge-made good faith exception, grounded in Fourth Amendment law, into Title III.[4] As this Court has

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[4]In most other cases applying Franks to suppression motions, unlike here, the defendants appear to have mounted Fourth Amendment challenges to probable cause, without any separate reliance on Title III's exclusionary rules. All parties thus agreed on a Franks approach. See, e.g., United States v. Leisure, 844 F.2d 1347, 1357-1358 (8th Cir. 1988) cert. denied, 488 U.S. 932; United States v. Ferguson, 758 F.2d 843, 848 (2nd Cir. 1985), cert. denied, 474 U.S. 841 (1985); United States v. Mastroianni, 749 F.2d 900, 909 (1st Cir. 1984); United States v. Marcello, 508 F. Supp. 586, 603-607 (E.D.La. 1981), aff'd. 703 F.2d 805 (5th Cir.), cert. denied, 464 U.S. 935 (1983).

In two cases where courts did apply Franks to strictly statutory issues--Title III's necessity requirement, 18 U.S.C. §§ 2518(1)(c) and (3)(c)--good faith was not in issue: the question was

(continued...)

explicitly directed:

> [T]he availability of the suppression remedies for these statutory, as opposed to constitutional violations ... turns on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights. United States v. Donovan, 429 U.S. 413, 433 n.22 (1977); accord, United States v. Chavez, 416 U.S. 562 (1974); United States v. Giordano, 416 U.S. 505 (1974); cf. United States v. Ojeda Rios, 495 U.S. 257 (1990). Emphasis added.

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[4](...continued)
whether bad faith misrepresentations or omissions were "material," a test also applied here, we assert, without Congressional authorization. A345-A354. Those circuits were in conflict on the nature of the "materiality" test, with the Fifth Circuit disapproving what it called the Ninth's Circuit's "diluted Franks standard." United States v. Guerra-Marez, 928 F.2d 665, 670 n.4 (5th Cir. 1991); United States v. Ippolito, 774 F.2d 1482, 1484-1487 (9th Cir. 1985). See also, United States v. Cantu, 625 F.Supp. 656, 663-664 (N.D.Fla. 1985), aff'd, 791 F.2d 940 (11th Cir. 1986) (defendant challenging veracity of wiretap affidavit on any statutory requirement must comply with Franks to obtain evidentiary hearing).

The Second Circuit's decision here (and that of the majority in United States v. Baranek, 903 F.2d 1068 [6th Cir. 1990]) flatly violates this directive, which is necessary to preserve the proper separation of powers between Congress and the judiciary.[5]

There can be no question that, in setting forth various good faith exceptions to the Fourth Amendment exclusionary rule, this Court exercised its proper role in defining and refining constitutional jurisprudence. There can also be no question that Congress exercised its proper role in setting its

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[5]The Florida Supreme Court, ruling Fourth Amendment good faith exceptions inapplicable to the state wiretap statute's exclusionary rule, certified the issue as a "question of great public importance." State v. Garcia, 547 So.2d 628, 629 (Fla. 1989).

own standards for suppressing evidence where the wiretap statute is violated.

The necessary inquiry here, which the Second Circuit failed to conduct, A72-A75, was to determine Congressional intent. There is no evidence that Congress ever intended any good faith exception to Title III's exclusionary rules and substantial evidence to the contrary. In 1986--after both Leon and Franks had narrowed the Fourth Amendment exclusionary rule--Congress amended 18 U.S.C. § 2520(d) of Title III[6] and expressly provided for a good faith defense "against any civil or criminal action brought under this chapter or any other law." 18 U.S.C. § 2520(d). By contrast, Congress did not enact any new

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[6]P.L. 99-508, Title I, § 103, 100 Stat. 1854 (1986).

good faith exception to Title III's exclusionary rules, 18 U.S.C. §§ 2515, 2518(10)(a). The principle of expressio unius est exclusio alterius thus compels the conclusion that Congress did not authorize the courts to apply such an exception. Sutherland Statutory Construction, § 47.23 (5th ed. 1992). Marbury v. Madison, 1 Cranch (5 U.S.) 137, 174 (1803).

This Court has recognized that Congress had dual purposes in mind in drafting Title III's exclusionary rule: "not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct." Gelbart v. United States, 408 U.S. 41, 51 (1972). These are broader than the deterrent purpose of the Fourth Amendment exclusionary rule

emphasized in recent years by this Court.[7]

Here, both the District Court and the Second Circuit agreed that the government engaged in illegal conduct, by withholding relevant information from the issuing judge in violation of a central provision of Title III, 18 U.S.C. § 2518(11)(a)(ii) and of a second important disclosure provision, 18 U.S.C. § 2518(1)(e). A149-A157, A188-A189, A330-A333, A369-A370; A36-A40, A68-A72, A83. Under these circumstances, this court has squarely held that Congress' bright-line exclusionary rules required suppression. United States v. Donovan, 429 U.S. 413, 437 (1977).

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[7]See, e.g, United States v. Leon, 468 U.S. 897, 906 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984).

Moreover, this case concerns illegal conduct by the government in a particularly sensitive area of the law: an application for a warrant which specifies no particular place or time for its execution. Assuming arguendo that Title III's "roving bug" provision is not unconstitutional (see question 2 below), it nonetheless comes dangerously close to authorizing a general warrant, giving the executive branch unprecedented discretion to install a multitude of listening devices in a multitude of places.[8] If law enforcement officers are to have such

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[8]The District Court noted the broad discretion granted the government here: "once the roving intercept order was issued, there was no express limitation on the number of places in which the government could install listening devices based upon executive, rather than judicial, branch decisions that there was a proper basis to do so." A259, 771 F. Supp. at 1293, emphasis added.

a powerful tool, which skates close to the thin ice of unconstitutionality, then the statutory pre-conditions must be enforced with the utmost rigor.

The line separating the statutory exclusionary rules controlled by Congress from the judicially-crafted Fourth Amendment exclusionary rule, a paradigm for the core principle of separation of powers, must remain inviolate. Certiorari is thus necessary to preserve the separate integrity of the courts and Congress, to correct improper judicial lawmaking, and to foster a unified system of law throughout the federal courts on an important federal question.

2. Whether the "roving bug" provisions of 18 U.S.C. §2518(11)(a) violate the Fourth Amendment is an important question of federal law which has not been but should be settled by this Court.

In 1986, Congress enacted a comprehensive eavesdropping reform provision designed to accommodate existing law to developing technologies. In the Electronic Communications Privacy Act of 1986,[9] Congress conferred additional protections upon persons utilizing new technologies such as electronic mail, computer transmissions, video teleconferencing, cellular telephones, some electronic pagers, and certain types of radio transmissions.[10] While the amended statute provided

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[9] Pub. L. No. 99-508, 100 Stat. 1848 (1986).

[10] H.R. Rep. No. 647, 99th Cong., 2d Sess., at 31-39 (1986) [hereinafter H.R. Rep. No. 647].

increased protection for certain privacy interests, it also authorized a novel law enforcement practice breathtakingly Orwellian[11] in its scope: the roving interception of conversations at an unlimited number of unspecified locations

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[11] Each of the commentators who has written about roving surveillance has been reminded of George Orwell. See, Fishman, "Interception of Communications in Exigent Circumstances: The Fourth Amendment, Federal Legislation, and the United States Department of Justice," 22 Ga.L.Rev. 65 (1987) ("There is something more than faintly Orwellian, of course, about the prospect that law enforcement officials can bug any number of hotel rooms, offices, or homes, all on the chance that a suspect might at some point during the authorized interception period choose to discuss his past, present, or future crimes in one of them"); Goldsmith, "Eavesdropping Reform: The Legality of Roving Surveillance," 1987 Univ. Ill. L. Rev. 401, 403 (1987) ("In a more isolated setting, a roving surveillance proposal would have been perceived and rejected as Orwellian. Instead, congressional desire to conform Title III to a host of new technologies provided an ideal context for modifying the specificity requirement.")

without the requirement of a warrant particularizing the place of the anticipated communication.

Despite the unprecedented scope of a provision that permits agents to make unwarranted entries into any number of locations in order to plant listening devices, Congress devoted almost no attention to the consequences of roving bugs. "The issue is barely mentioned in a legislative record encompassing four years of debate. Apparently, congressional attention was so focused on the broader questions of technological privacy, that the implications of roving surveillance were relatively unnoticed."[12]

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[12] Goldsmith, "Eavesdropping Reform," supra, at 403 n.6. Professor Goldsmith sets forth the very sparse legislative history of the roving surveillance provisions.

Prior to the adoption of the roving intercept amendment, Title III required that an application for an interception order contain "a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted." 18 U.S.C. §2518(1)(b)(ii). Before issuing a traditional interception order, a judge is required to find that there is probable cause to believe that the facilities or the place targeted for interception are being used, or are about to be used, in connection with the commission of the offenses specified in the application, or are leased to, listed in the name of, or commonly used by the individuals targeted in the application. 18 U.S.C. §2518(3)(d).

The roving intercept provision does away with these requirements: the place where the communication is to be intercepted does not need to be specified in the warrant, so long as the application contains a full and complete statement as to why such specification is not practical and a judge finds that such specification is indeed not practical. Ironically, in order to obtain authorization to make a surreptitious entry, a governmental agent must establish that there is no probable cause to make an entry into any particularized place.

Prior to this case, no federal court of appeals had passed upon the constitutionality of the roving bug amendments to Title III. One appellate court and one district court had found

constitutional the roving wiretap provisions of §2518(11)(b). United States v. Petti, 973 F.2d 1441 (9th Cir. 1992), cert. denied, 113 U.S. 1859 (1993); United States v. Silberman, 732 F.Supp. 1057 (S.D.Cal. 1990). Wiretaps, however, do not generally involve the unsupervised entry into private residences that is the most alarming feature of roving bugs. See United States v Scafidi, 564 F.2d 633, 645 (2d Cir. 1977) (Smith, J., dissenting) (referring to the dangers of surreptitious entries for the purpose of placing listening devices), cert. denied, 436 U.S. 903, 912 (1978).

Does a statute which leaves to the discretion of the investigative officer all decisions as to the locations and the number of places to be entered, the frequency of entry, and the time and

manner of entry satisfy the Fourth Amendment? Is the requirement of particularity satisfied by a provision that entrusts to a governmental agent all decisions as to which of the target's friends, lovers, associates, confessors, healers, confidants and relatives should have their residences entered surreptitiously and wired for governmental surveillance? Are decisions as to whose home should be bugged constitutionally entrusted to an "officer engaged in the often competitive enterprise of ferreting out crime"? Johnson v. United States, 333 U.S. 10, 14 (1948).

The general warrant, the unrestricted search, the roving commission have been condemned by Americans since Colonial days. Coolidge

v. New Hampshire, 403 U.S. 443, 467 (1964); Marron v. United States, 275 U.S. 192, 195 (1927); Boyd v. United States, 116 U.S. 616, 625 (1886). The Fourth Amendment forbids roving commissions of investigative officers by establishing the requirement of a warrant that particularly describes the place to be searched. "The primary reason for the warrant requirement is to interpose a 'neutral and detached magistrate' between the citizen and 'the officer engaged in the often competitive enterprise of ferreting out crime.'" United States v. Karo, 468 U.S. 705, 717 (1984); Johnson v. United States, 333 U.S. at 14.

The requirement of a warrant is especially important where the place to be entered, as here, is a private residence. "At the risk of belaboring

the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is one that society is prepared to recognize as reasonable." United States v. Karo, 468 U.S. at 714. "Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances." Id., Welsh v. Wisconsin, 466 U.S. 740, 748-49 (1984); Steagald v. United States, 451 U.S. 204, 211-12 (1981).

The Court of Appeals for the Second Circuit found the roving bug provision constitutional because it believed that the Fourth Amendment should not be applied literally, that this Court has favored "a flexible approach designed to

keep pace with a technologically advancing society," A54-A55, 998 F.2d at 1123, and that the "prohibition against 'unreasonable searches and seizures' must be interpreted 'in light of contemporary norms and conditions.'" Id., quoting Steagald v. United States, 451 U.S. 204, 217 n.10 (1981). Yet the only technological advancement involved in this case is the advancement in the electronic devices that are available to the Government for surreptitiously intercepting and transmitting conversations. The ceremony that was intercepted had its origins, as the panel noted, "hundreds of years ago," A34, 998 F.2d 1119, and there was nothing in the application for this interception warrant that reflected any "contemporary norms and conditions" that were different from

norms and conditions applying to organized crime from time immemorial.

The decision of the Court of Appeals, by eliminating the need for particularity in the place to be searched, weakens Fourth Amendment protections for our "technologically advanced society" at a time when such protections are needed more than ever. This question--whether the "roving bug" provisions of 18 U.S.C. § 2518(11)(a) violate the Fourth Amendment--is an important question of federal law which has not been but should be settled by this Court.

3. There exists among the courts of appeals a square and irreconcilable conflict concerning the question of whether an affidavit which is not incorporated into and attached to a search warrant can cure a fatal defect in that warrant.

The courts of appeals have generally recognized that where a warrant lacks particularity, the affidavit in support of the warrant can provide the requisite particularity--so long as the affidavit accompanies or is attached to the warrant and the warrant uses suitable words of reference which incorporate the affidavit. United States v. Harris, 903 F.2d 770, 775 (10th Cir. 1990); United States v. Vaughan, 830 F.2d 1185, 1186 (D.C.Cir. 1987) (per curiam); United States v. Weinstein, 762 F.2d 1522, 1531 (11th Cir.), modified, 778 F.2d 673 (1985), cert. denied, 475 U.S. 1110 (1986); United States v. Klein, 565 F.2d

183, 186 n. 3 (1st Cir. 1977); United States v. Johnson, 541 F.2d 1311, 1314-15 (8th Cir. 1976); United States v. Womack, 166 U.S.App.D.C. 35, 49, 509 F.2d 368, 382 (D.C.Cir. 1974), cert. denied, 422 U.S. 1022 (1975).

Prior to the decision below, however, every court of appeals that had considered the question had held that deficiencies in a warrant could not be remedied by an affidavit which was not incorporated into and attached to the deficient warrant. United States v. Beaumont, 972 F.2d 553, 560-63 (5th Cir. 1992); United States v. Crozier, 777 F.2d 1376, 1381 (9th Cir. 1985); United States v. Strand, 761 F.2d 449, 452-54 (8th Cir. 1985); Application of Lafayette Academy, 610 F.2d 1, 3-4 (1st Cir. 1979); United States v. Haydel, 649 F.2d 1152, 1156-57

(5th Cir. 1981), cert. denied, 455 U.S. 1022 (1982).

In the case below, the Court of Appeals for the Second Circuit departed from this previously universally recognized principle. The Court of Appeals properly found that a warrant authorizing the search of "[N]otes, Ledgers, Envelopes, Papers, and Records Containing Initials, Names, Addresses, Dollar Amounts, Codes, Figures, and the Like: United States Currency" was overbroad. A13-A18, 998 F.2d at 1115-1117. The Court of Appeals also recognized that the warrant did not incorporate the affidavit and that the affidavit was not physically attached to the warrant. A19, 998 F.2d at 1117.[13]

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[13]The Court of Appeals also was under the mistaken view that the (continued...)

The Court of Appeals furthermore noted that other circuits had required that affidavits be incorporated and attached to the warrant before such affidavits would be held to cure deficiencies in the warrants that they support. Id. Nevertheless, the Court of Appeals held that the fatal overbreadth of this warrant could be cured by an affidavit which was neither incorporated into nor attached to the warrant. Id. So far as counsel can determine, the Second Circuit

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[13](...continued)
affidavit was present at the site of the search. A21; 998 F.2d at 1117. There was no evidence that this was the case and the Government did not make this assertion either in the District Court or in its brief to the Court of Appeals. In fact, the affiant specifically requested that the affidavit be sealed so that the targets of his investigation would not be able to review it, Affidavit at 12, and the affidavit was sealed by the issuing court.

is the first and only circuit to have so held.

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. Marron v. United States, 275 U.S. 192, 196 (1927); accord, Andresen v. Maryland, 427 U.S. 463, 480 (1976); Stanford v. Texas, 379 U.S. 476 (1965). The dangers of the Second Circuit's holding, unique among the circuits, that lack of particularity in a warrant may be cured by an affidavit that is not incorporated into or attached to the warrant is well illustrated by this case.

The affidavit sought to establish that evidence of loan-sharking would be found in the Failla residence. The agent who acted as affiant did not himself participate in the search of the Failla residence. Among the large number of federal agents, local police officers, technicians and photographers who did conduct the search, only one, Special Agent Hutton, had read the affidavit. The searching agents knew what they were looking for, according to Agent Hutton, because "every one of these searching agents worked personally with me, in the same room with me--over the past year prior to that--were aware of what we were looking for." 2/19 Tr. 35. During that previous year, however, the agents had been involved in an investigation that was exponentially broader than the

limited investigation described in the affidavit, as the indictment and the trial indicate, and so it is not surprising that Agent Hutton himself believed that the search warrant authorized the seizure of items never even alluded to in the affidavit. Agent Hutton, the only searching agent who had read the affidavit, testified that he believed that the warrant permitted the seizure of documents linking the defendant to the murder of William Grasso, documents linking the defendant to the harboring of organized crime fugitives, documents linking the defendant to the disappearance of various organized crime figures--in short, any document that evidenced any mob activity whatsoever. 2/19 Tr. at 38-41. And it

was Agent Hutton who had "the final word o[n] what was seized." 2/19 Tr. at 59.

Nor is it surprising that the agents seized a large number of documents that were not within the scope of the search warrant even as that warrant was limited by the affidavit's description of the defendant's loan-sharking: keys, the defendant's passport, address books belonging to Failla's wife and daughter containing no name mentioned in the affidavit, a variety of different papers and articles including a newspaper article about the death of William Grasso that predated the activities described in the affidavit by several years. The searching agents testified that they believed that these items were within the scope of the warrant. 2/19 Tr. 67-68. Agent Hutton was well aware of the "plain

view" doctrine but he did not rely upon it to justify these seizures: he testified that he believed that each of these seizures, so clearly not encompassed within the affidavit, was authorized by the warrant. 2/19 Tr. 51.

Because the Second Circuit's departure from the holdings of other circuits creates a square and irreconcilable conflict among the circuits and because this departure, as illustrated by this case, severely undermines the particularity requirement of the Fourth Amendment, Petitioner Failla requests review of this question.

4. Where, as here, the government's violations of Title III operated to deny Petitioners Bianco and Pugliano standing and where the Second Circuit has improperly equated Title III and Fourth Amendment standing requirements, this case presents an important question of federal law which should be decided by this Court.

Title 18 U.S.C. Section 2510(11) defines "aggrieved person" as "a person who was a party to any intercepted wire, oral or electronic communication or a person against whom the interception was directed." A person who meets this definition may exercise his statutory right, pursuant to 18 U.S.C. § 2518 (10)(a), to move to suppress the contents of any wire or oral communication intercepted on the grounds, inter alia, that the communication was unlawfully intercepted. The language of Title III defining an "aggrieved person" for the purposes of invoking the statutory right

to move to suppress evidence thus requires an accused to show that the electronic interception was directed at him, or the government actually intercepted his conversations, or that the wiretapped communications occurred at least partly on his premises. United States v. Williams, 580 F.2d 578, 583 (D.C.Cir. 1978).

Standing for the purpose of a challenge to a Title III order is not as strictly limited as traditional concepts of Fourth Amendment case law. Title III provides a separate statutory mechanism for determining a defendant's legal standing to challenge the contents or derivative evidence of electronic surveillance offered by the government. As this court has held, the availability of Title III's suppression remedies

> does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III. United States V. Giordano, 416 U.S. 505, 524, (1974).

The inquiry turns then to a review of the attendant facts to determine whether the application and order reflect whether Petitioners Bianco and Pugliano were persons against whom the interception was "directed."

The application sought authorization to conduct roving electronic surveillance of Joseph Russo, Vincent Ferrara and Robert Carroza as principal targets of the roving intercept order. The application further stated and there was probable cause to believe Frank Pugliano and Nicolas Bianco, along with eight other named individuals, were also engaged in the listed offenses. The order permitted the government to direct

its surveillance efforts against any of those named parties provided their communication was "directed to and/or in the presence of" any of the named principal targets. A110.

The application did not disclose the fact that prior applications for other individuals named in the Application had been sought, including Petitioner Bianco, in violation of the disclosure provisions of 18 U.S.C. § 2518(1)(e). A373-A377; 771 F.Supp. at 1315. The District Court held, "Where the government had decided to name in its Application individuals believed to be co-conspirators of the proposed principal targets of an interception order, it had an obligation to inform the issuing judge of all prior requests to intercept conversations of those individuals." Id.

In United States V. Donovan, 429 U.S. 413 (1977), this Court rejected the government's effort to make a distinction between "principals" and other suspects in the context of the naming requirement of section 2518 (1)(b)(iv) of Title III. This conclusion is also appropriate with regard to the prior application disclosure requirement found violated here. A373-A377; 771 F. Supp. at 1314-1315.

In Donovan, supra, this Court stated that individuals must be named in the Application pursuant to section 2518 (1)(b)(iv) if the government has probable cause to believe a person was engaged in the criminal activity under investigation and was expected to be intercepted. The District Court here also held that it is

insufficient to identify only the principal target of a requested warrant if there are known individuals whose incriminating communications are expected to be intercepted. A376-A377. The court concluded that at the time the Application was signed by Judge Nelson the government had probable cause to believe it would soon intercept a Patriarca Family induction ceremony and the government had probable cause to believe that at least some of those named as co-conspirators in the Application in addition to the three principals would be intercepted. Id.

The court went to great lengths in Ferrara, in denying the motions to suppress, to minimize the government's errors with respect to the violations of section 2518(1)(e) and section 2518(1)

(b)(iv), and the Second Circuit adopted the Ferrara opinion in its entirety. A76-87. But what the District Court called the government's "innocent error" (A384) was tantamount to denying Petitioners Bianco and Pugliano standing under §§ 2510 (11) and 2518(10)(a). Because, as the District Court found, the government had probable cause to believe that some of the named co-conspirators in the Application in addition to the three principals would be intercepted, Petitioners Pugliano and Bianco should have been named in the Application. Thus, but for the defect in the government's application, the defendants would have had standing to challenge the 34 Guild Street interception. United States v. Vastola, 670 F. Supp. 1244 (1987), 680 F. Supp 709, (1988), 685 F.

Supp. 917 (1988), 899 F2d. 211 (1990) (defendants not named in application lacked standing). Additionally, standing has been conferred upon all persons overheard in a wiretap found to be illegal because the government failed to disclose that one person under investigation had been subject to previous wiretap authorization, and not just the person who was the subject of the prior authorization. United States v. Bellosi, 501 F.2d 833 (D.C.Cir. 1974).

By contrast with the facts in Donovan, supra, at 437, where the naming requirement of subsection (1)(b)(iv) was deemed not "to play a central, or even functional role in guarding against unwarranted use of wiretapping and electronic surveillance," Petitioners Bianco and Pugliano urge that, on the

facts surrounding this case, it played a highly central role: it deprived them of standing.

Senator Hart, in filing an amendment to section 2510 (11) which was not adopted by Congress, attempted to include within the definition of "aggrieved person" "any person against whom the communication or evidence derived therefrom is sought to be used." Senator Hart argued that Title III is likely to encourage illegal electronic surveillance of petty hoodlums by law enforcement officers to gain intelligence information against their bosses, secure in the knowledge that their illegal activities cannot be challenged in Court. 114 Cong. Rec. § 12508 (1968). Petitioners suggest that the "directed against" language of section 2510(11) may be a person's only

recourse when the government attempts to circumvent the requirements of section 2518(1)(b)(iv) in an order that clearly anticipates interception of parties other than principal targets and where the language of the order itself permits the government to direct electronic surveillance against all those parties. This, Petitioners contend, was the motivation of the government in failing to comply with prior application disclosure requirement of Section 2518 (10)(a) and the naming requirement of Section 2518(1)(b)(iv).

Based upon the facts of this case as set forth in Ferrara, A373-380, and adopted by the Second Circuit, A76-A87, Petitioners urge that the numerous violations in the application--of §§ 2518 (1)(e), 2518 (1)(b)(iv), 2518(11)(a)(ii)

and possibly § 2518 (1)(c)--when viewed cumulatively, cast serious doubt over the government's motivations. What the Court deemed to be the government's "inadvertent errors" in failing to comply with the requirements of Title III underscores the need to apply a flexible interpretation of the "directed against" language in defining standing, particularly against the background of the broadly worded roving surveillance order here.

Because the government's misconduct here, excused by the Second Circuit, deprived Petitioners of standing, because the Second Circuit disregarded the language of Title III and referred only to Fourth Amendment standing requirements, A49-A52, and because the scope of Title III's standing provisions

presents an important issue of federal law, certiorari should be granted.

CONCLUSION

For each of the foregoing reasons, Petitioners pray that this Court grant their petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit affirming their convictions.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA, Appellee,
v.

NICHOLAS L. BIANCO, a/k/a Nicky; LOUIS R. FAILLA, a/k/a Louie; GAETANO J. MILANO, a/k/a Costello; AMERICO PETRILLO, a/k/a Rico, a/k/a Cigar; FRANK A. PUGLIANO, a/k/a Frankie Pugs; LOUIS PUGLIANO, a/k/a Louie Pugs; SALVATORE D'AQUILA, JR., a/k/a Butch, Defendants-Appellants,

RICHARD JOSEPH BEEDLE; JOHN F. CASTAGNA, a/k/a Sonny; FRANK COLANTONI; JOHN E. FARRELL, a/k/a Jack Sailorman, a/k/a Jack Fast; MATTHEW L. GUGLIEMETTI, JR., a/k/a Matty; JACK JOHNS, a/k/a Jackie, Defendants.

Nos. 91-1672, 91-1701, 91-1702, 91-1703, 91-1704, 91-1705, 91-1706

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

998 F.2d 1112

November 18, 1992, Argued
July 19, 1993, Decided

BEFORE: PRATT and ALTIMARI, Circuit Judges, and Gerald W. HEANEY, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appeals from judgments of conviction entered after a jury trial in the United

States District Court for the District of Connecticut, Alan H. Nevas, Judge. Defendants raise numerous arguments, including claims that 18 U.S.C. § 2518(11)(a), which authorizes a "roving bug" to intercept oral conversations without providing the issuing court with details as to the place of interception, is unconstitutional on its face and as applied in this case.

Affirmed.

ROBERT J. DEVLIN, JR., Assistant United States Attorney for the District of Connecticut (Albert S. Dabrowski, United States Attorney; John H. Durham, Chief, Criminal Division; Peter S. Jongbloed, Assistant United States Attorney, of Counsel), for Appellee.

WENDY SIBBISON, Greenfield, MA (Stephanie A. Levin and Holly Sobel Armitage, of Counsel), for Defendant Milano. BARRY M. FALLICK, New York, NY (Rochman Platzer Fallick Rosmarin & Sternheim, Bobbi C. Sternheim, of Counsel), for Defendant D'Aquila, Jr. JEREMIAH DONOVAN, Old Saybrook, CT, for Defendant Failla. RICHARD S. CRAMER, Wethersfield, CT, for Defendant Petrillo. WILLIAM A. DIMITRI, JR., Providence, RI (Dimitri & Dimitri; Edward J. Romano, of Counsel), for Defendant Bianco. VINCENT A. BONGIORNI, Springfield, MA, for Defendant Frank Pugliano. HARRY L. MANION, Boston, MA (Anthony Cardinale, Vincent A. Bongiorni, of Counsel), for Defendant Louis Pugliano.

PRATT, Circuit Judge:

Trial of this organized-crime racketeering case commenced on April 17, 1991, and continued for 45 days. All seven defendants were convicted of belonging to a RICO conspiracy in violation of 18 U.S.C. § 1962(d). Five of them were convicted of related RICO substantive charges under 18 U.S.C. § 1962(c). Five were convicted of either conspiracy or substantive violations of 18 U.S.C. § 1959, which prohibits violent crime in aid of racketeering. Two were convicted of wire fraud in violation of 18 U.S.C. § 1343. One was convicted of extortion in violation of 18 U.S.C. § 894(c). All defendants have appealed.

The RICO charges, the principal crimes at issue, focused on the organized-crime Patriarca family of La Cosa Nostra (LCN)

as the enterprise, which operated in New England over a period of many years under the leadership of Raymond L.S. Patriarca, who died in 1984 after designating his son, Raymond J. Patriarca, and William Grasso of New Haven, Connecticut, to head the enterprise.

The RICO charges were amply supported at trial by evidence that established not only the existence and history of the Patriarca family enterprise, but also each defendant's participation, or agreement to participate, in at least two of a long list of predicate acts of racketeering activity, including murder, drug trafficking, extortion, obstruction of justice, and gambling.

On appeal, defendants raise 42 different points and argue them in a total of 411 pages of briefing. They

challenge the indictment, the jury charge, the sentences, the makeup of the jury, numerous evidentiary and procedural rulings, and the sufficiency of the evidence. To all that, the government responds with two briefs totaling 270 pages.

We have carefully reviewed all of defendants' arguments in light of the record, briefs, and oral argument, and we find most of them to be so lacking in merit as to be unworthy of discussion. One of defendants' arguments -- their all-out attack against the "roving bug" tape recording of their LCN initiation ceremony -- requires extensive analysis. Two other arguments -- a claimed flaw in the makeup of the jury panel, and the admission of evidence obtained from a search of defendant Failla's private home

in East Hartford, Connecticut -- require brief comment. We will discuss first the latter two arguments, and then take up defendants' challenge to the government's "roving bug".

A. Jury Panel.

Defendant Milano is joined by his co-defendants in contending, for the first time on appeal, that the systematic, albeit inadvertent, exclusion of Blacks and Hispanics from the qualified jury wheel of the Hartford division of the District of Connecticut, between late 1989 and late August 1992, resulted in a violation of their sixth-amendment right to a fair trial. During this period, through an apparent computer-related error in processing names and addresses, the wheel included no citizens from the

division's principal cities, Hartford and New Britain, where two-thirds of its voting-age, minority population resides. Defendants argue that this denied them a fair cross-section of jurors in the community.

Defendants base their claim, in large measure, on Judge T.F. Gilroy Daly's order dated August 26, 1992, made in a separate case, where the same defective jury panel had been used. United States v. Osorio, 801 F. Supp. 966 (D. Conn. 1992) (inadvertent exclusion of residents of New Britain and Hartford communities from qualified jury wheel, resulting in exclusion of approximately two-thirds of Blacks and Hispanics in the division as source of names for grand jury selection, constituted systematic exclusion of those groups from jury-selection process and

gave rise to prima facie fair-cross-section violation).

Osorio may well be distinguishable, because it was based on a timely pretrial challenge to the juror-selection process, and it involved a grand jury, not a petit jury. We do not, however, address the merits of defendants' challenge to their jury panel on this direct appeal after conviction. The issue was [*1115] not presented to the district court; the record before us in this case provides an inadequate basis to resolve the issue. We therefore leave the issue to be pursued through whatever post-conviction remedies defendants may still have available to them.

B. Admission of Evidence Seized from Failla's Home.

Defendant Failla contends that the trial court erred in refusing to suppress

certain evidence that was seized during a search of his home. Failla specifically claims that the warrant authorizing the search was defective because it was not particular enough to limit the scope of the search. The government responds by arguing that (1) the descriptions used in the warrant at issue are more narrow than descriptions upheld in other cases; (2) even if the warrant was not particular enough, any ambiguity in the warrant is resolved by reference to the affidavit; and (3) even if we were not to rely on the supporting affidavit, we should uphold the search under the good-faith exception of United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984).

1. Background Facts.

The district court issued a warrant to search Failla's home at 58 Cloverdale Drive, East Hartford, Connecticut, and a small shed outside the home in order to seize the following items:

> Notes, Ledgers, Envelopes, Papers, and Records Containing Initials, Names, Addresses, Dollar Amounts, Codes, Figures, and the Like: United States Currency.

No further limitation was made, nor was there any reference in the warrant itself to loansharking or any other crime. However, the supporting affidavit of special agent Richard T. Roberts set forth additional detail. It stated that the agents were looking for evidence of Failla's loansharking, described Failla's ongoing extortionate activities, and set forth portions of four conversations in which Failla stated that in his home he had records of his activities.

While the agents were executing their search of the house, they brought particular items they found to special agent William Hutton, who decided whether or not they should be seized. Hutton had familiarized himself with the warrant and its supporting affidavit, and was aware that he was looking for evidence of loansharking.

2. Challenge to the Breadth of the Warrant.

Failla moved in the district court to suppress any evidence seized during the course of the search on the ground that the warrant failed to particularly describe the property to be seized. This motion was denied after a hearing, and a number of the seized items were introduced during the trial.

The fourth amendment requires that warrants "particularly describe * * * the person or things to be seized." U.S. Const. amend. IV. The particularity requirement "makes general searches * * * impossible and prevents the seizure of one thing under a warrant describing another." Marron v. United States, 275 U.S. 192, 196, 72 L. Ed. 231, 48 S. Ct. 74 (1927). It prevents a "general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971).

The government points out that where agents have done all that could reasonably have been expected in drawing up a warrant, the inability to provide a more precise description of the criminal instruments to be found will not render

the warrant defective. See, e.g., United States v. Young, 745 F.2d 733, 759 (2d Cir. 1984) (courts tolerate greater degree of ambiguity where agents have done best they reasonably could under circumstances), cert. denied, 470 U.S. 1084 (1985); United States v. Dunloy, 584 F.2d 6, 8 (2d Cir. 1978) (warrant not impermissibly broad when officers were unable under circumstances to provide more precise description).

Those cases, however, do not help the government, for each involved a situation where the government was under emergency pressures that necessitated a broadly worded warrant. Significantly, there was no such emergency here. Moreover, along with the imprecise language in those cases, the warrants [*1116] included precise descriptions of some items to be

seized as well as specifications of the suspected crimes. See Young, 745 F.2d at 758 ("Quantities of heroin and other controlled substances, other chemical substances, equipment, utensils, paraphernalia, containers, money, notes, documents and papers and other evidence of a conspiracy to distribute and of the distribution * * * [of] controlled substance."); Dunloy, 584 F.2d at 8 (warrant to seize from safe deposit box "a quantity of cocaine, and additionally, all narcotic drug controlled substance, documents, records and other evidence of distribution and possession with intent to distribute narcotic drug controlled substances"). See also Andresen v. Maryland, 427 U.S. 463, 479, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1976) [**10] (upholding search where exhaustive list

of particularly described documents was coupled with open-ended nonparticular authorization). In this case, however, the warrant contained no particular description of items and made no mention of any criminal statute or criminal conduct.

The government's attempts to characterize other cases as supporting this high a level of ambiguity are easily distinguishable. The government states with misplaced confidence that "contrary to Failla's assertion * * *, the descriptions used in the warrant are more narrow then [sic] descriptions upheld in other cases." The government then points to United States v. Kepner, 843 F.2d 755, 757 (3d Cir. 1988), in which the court upheld a warrant that authorized seizure of "documents, records and personal

effects." In that case, though, the court found that the wording of the warrant was not overbroad, because the officers were searching for any proof that the defendant lived in the searched apartment. Id. In that situation, distinguishable from this case, anything with the defendant's name on it was evidence.

The other case the government points to in support of the broad wording of this warrant is United States v. Dennis, 625 F.2d 782, 792 (8th Cir. 1980) ("certain books and records relating to the extortionate credit transaction business"). Even in Dennis, however, the documents had to relate to the crime of extortion, a limitation that is lacking here. If anything, therefore, Dennis undercuts the government's claim.

We held in United States v. Buck, 813 F.2d 588, 590-92 (2d Cir.), cert. denied, 484 U.S. 857, 98 L. Ed. 2d 121, 108 S. Ct. 167 (1987), that a warrant authorizing officers to "seize any papers, things or property of any kind relating to previously described crime" was overly broad, because it "gave no limitation whatsoever on the kind of evidence sought", even though it did describe the crime under investigation. Here, however, the warrant, when viewed by itself, describes neither the precise items to be seized nor the possible crimes involved.

Based on current case law, and focusing solely on the warrant itself, we think that the warrant issued to search Failla's home was broader than we can accept. The fact that we have upheld

similarly broad provisions when they were coupled with more particular limiting language, or at least tied to particular crimes, tends to indicate that standing alone, the highly generalized provisions in this case are not supportable.

3. Reliance on the Affidavit.

The failure of the warrant to particularly describe the items to be seized does not render the warrant incurably defective. While this court has not yet held that ambiguity in a warrant may be resolved by reference to the affidavit submitted to obtain the warrant, other courts have done so in circumstances where the affidavit was incorporated by reference into the warrant and attached to the warrant. See, e.g., United States v. Harris, 903 F.2d

770, 775 (10th Cir. 1990); United States v. Vaughn, 265 U.S. App. D.C. 301, 830 F.2d 1185, 1186 (D.C. Cir. 1987) (per curiam); United States v. Weinstein, 762 F.2d 1522, 1531 (11th Cir.), modified, 778 F.2d 673 (1985), cert. denied, 475 U.S. 1110 (1986).

In this case, while the warrant refers to the affidavit there is no express language of incorporation. Nor does it appear that the affidavit was physically attached to the warrant. However, under the facts of this case, the functional purposes of those two requirements -- to insure that all parties involved are informed of the scope of and limits upon the [*1117] authorized search -- were fully satisfied. See United States v. Wuagneux, 683 F.2d 1343, 1351, n.6 (11th Cir. 1982) (looking to underlying

affidavit even where unattached to warrant, where searchers were adequately informed of limitations on search), cert. denied, 464 U.S. 814, 78 L. Ed. 2d 83, 104 S. Ct. 69 (1983); United States v. Zanche, 541 F. Supp. 207, 213 (W.D.N.Y. 1982) ("it was also proper to examine the affidavit in deciding the degree of specificity required in the warrant"). Warrants must be read in a "commonsense" fashion, see United States v. Ventresca, 380 U.S. 102, 109, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965), and we should not adhere to formal requirements of incorporation and attachment where as here, it is clear that the involved parties were aware of the scope of and limitations on the search.

In this case, it is clear that both the federal agents and Failla were

apprised of these factors. The affidavit was present at the time of the search, and spells out quite clearly the nature and purpose of the proposed search. It explains in detail the motivation behind the search and the nature of the documents sought. When the warrant and affidavit are read together, there is no ambiguity. Moreover, although the warrant may not have explicitly incorporated the affidavit, the presence and activity of agent Hutton, who had read the affidavit and who approved each seizure, satisfies us that the limitations included in the affidavit were observed.

In a broader sense, also, the record establishes that this was not an unreasonable search. Far from showing ambiguity, the documents and testimony show that the agents knew what they were

looking for, and that in executing the search they took only that which they needed and which was contemplated by the authorizing papers. We caution law-enforcement agents, however, to be sensitive to the need to particularly describe in all warrants and applications the nature, extent and limits upon the search to be authorized in order to conform to the fourth amendment's particularity requirement. In this case, because of the presence at the search of the affidavit, agent Hutton's active supervision of the search, the specificity of the affidavit, and the fact that the agents did not exceed the scope of the warrant and affidavit when read together, we conclude that the search was reasonable.

4. Good Faith Issue.

In light of our conclusion that there was no violation of the fourth amendment's requirement of particularity, there is no need to consider whether under Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405, the challenged evidence could also have been permitted on the theory that the executing officers had acted in good faith in relying on the warrant issued by the district court.

C. The "Roving Bug".

1. Background Facts.

In the summer of 1989 the FBI received information about a power struggle within the Patriarca family of LCN. In particular, a Patriarca family "underboss", William Grasso, and a Patriarca "soldier", Francis Salemme,

were murdered. Believing further violence was likely, the FBI intensified its investigation into the Patriarca family.

The FBI believed that some members of the Patriarca family, including Joseph Russo, Vincent Ferrara, and Robert Carrozza, had begun to suspect efforts by law-enforcement officers to surveil their activities. To thwart those efforts, these individuals, along with others, had begun to communicate in varying ways and locations designed to make routine electronic surveillance difficult.

2. Application for the Interception Order.

By the middle of October 1989, the FBI had learned that the Patriarca family intended to induct several new members into the LCN. One of the candidates for

induction was Vincent Federico, who was serving a Massachusetts prison sentence for murder. Recognizing the highly secretive nature of this event, as well as the likelihood that the Patriarca family would seek to avoid any government surveillance of it, the government agents decided to seek a warrant under 18 U.S.C. § 2518(11)(a) that would authorize a "roving bug", i.e., interception by electronic means of oral communications without specifying in advance exactly where or when the [*1118] interception would occur. Specifying Russo, Ferrara, and Carozza as the particular targets of their proposed interception, the government applied to the district court in Massachusetts.

In compliance with the requirements of Title III, the United States Attorney's

office submitted to the Department of Justice a proposed application of special attorney Diane Kottmyer, an affidavit of Walter J. Steffens of the FBI, and a proposed order. These papers were hand-delivered to the justice department on October 24, 1989. They described in detail the efforts by the targeted individuals to thwart surveillance, as well as information indicating that there was probable cause to believe that those individuals had engaged in two murders as well as other criminal activities.

The Steffens affidavit made no mention, however, of a possible LCN induction ceremony. The government claims to have omitted it deliberately for several reasons. First, it was satisfied that the affidavit supplied sufficient information to establish the required

probable cause that criminal conversations would be obtained. Second, the government was concerned that if it revealed that particular confidential information in the affidavit, and should the information later get into the hands of the defendants, the Patriarca family would use violence or other illegal activity to obstruct justice, and the lives of the informants might be placed in jeopardy. In addition, the government did not yet know when and where, or even if, the ceremony would be held.

On October 26, 1989, the FBI learned that the ceremony was planned for Sunday, October 29, 1989, at or near Wellington Circle in Medford, Massachusetts. Suspecting that Federico might be inducted as one of the new members of the LCN, the FBI contacted the Massachusetts'

Department of Correction and learned that Federico had requested a 28-hour furlough, beginning on the morning of October 29, 1989. Federico's furlough application reported that he intended to stay on Sunday, October 29, 1989, at the house of his brother-in-law, Stephan DiStefano, at 34 Guild Street, in Medford, an address that was near Wellington Circle.

Expecting the justice department's approval to arrive very soon, Special Attorney Kottmyer, on the morning of Friday, October 27, 1989, delivered to United States District Judge David Nelson, in Massachusetts, copies of her warrant application, Steffen's affidavit, and the proposed order. That evening, after the justice department had telefaxed its approval, Kottmyer met with

Judge Nelson. The submitted papers did not reveal (1) anything about the anticipated induction ceremony, or [**19] (2) that an authorization for a similar roving-intercept order was simultaneously being sought in Rhode Island to investigate Nicholas Bianco, a defendant in the instant appeal. Kottmyer did, however, alert Judge Nelson that interceptions might take place that weekend.

3. The Order is Issued.

Judge Nelson signed the order approving a roving interception pursuant to 18 U.S.C. § 2518(11)(a). See generally Wire Electronic Communications Interception and Interception of Oral Communications Act, 18 U.S.C. § 2510, et seq. (1988). He was satisfied (1) that

there was probable cause to believe the targeted individuals had committed and were continuing to commit crimes, including murder, through the RICO enterprise; (2) that normal investigative techniques had either been tried unsuccessfully or reasonably appeared unlikely to succeed if tried, or to be dangerous; (3) that there was probable cause to believe evidence of the specified crimes would be obtained through electronic surveillance of oral communications involving the targeted individuals; and (4) that it was not practical to specify each of the locations at which such communications would be intercepted. United States v. Ferrara, 771 F. Supp. 1266, 1280 (D. Mass. 1991).

The order authorized the agents to "intercept oral communications made by, directed to, and/or in the presence of Joseph A. Russo, Vincent M. Ferrara, and Robert F. Carrozza concerning the [earlier identified] offenses, at such various and changing locations." It also authorized the agents to enter buildings surreptitiously to install listening devices, but it required that the court be notified of such entries and their location in [*1119] advance, if possible, or as soon thereafter as possible, if advance notice were not feasible. The order specified that no interception could occur unless visual or other surveillance indicated that Russo, Ferrara and/or Carrozza was present.

4. Surreptitious Entry and Recording of the Conversations.

On Saturday afternoon, October 28, 1989, after observing the DiStefano family leave their home at 34 Guild Street, the FBI decided to install listening devices there. Kottmyer attempted to notify Judge Nelson by telephone of the government's intended entry, but she was unsuccessful.

The next morning at 9:00 a.m., however, she spoke with the judge in his chambers, advising him that pursuant to his order, a surreptitious entry had been made the previous evening, and that the authorized oral interceptions would likely proceed later that day.

Soon thereafter, agents observed Russo and Ferrara enter 34 Guild Street, and the interceptions began. During these

interceptions the government overheard and recorded a ceremony that inducted into LCN four "made" members of the Patriarca family, including Federico. It recorded, apparently for the first time ever, an induction ceremony of LCN. As part of the ceremony (1) new inductees took an oath of lifetime allegiance, loyalty, devotion, and secrecy to the enterprise; (2) the "trigger" finger of each inductee was pricked, and his blood was placed on a picture of a saint that was set afire and held by the inductee in his hands, while he acknowledged that death was his only release from the organization; and (3) each inductee was assigned a "capo" or boss, who was to supervise his criminal activity.

In addition, the old members explained the origins, hundreds of years ago, of

the LCN; the inductees promised that on orders they would kill their brother or son "without hesitation"; and the inductees were instructed that "all business deals legal and illegal" must be "brought to the table" before doing business with any nonmember of the organization. Ironically, at the end of the ceremony, one LCN member observed, "Only the 'f---in' ghost knows what really took place over here, today, by God." Unfortunately for these defendants and LCN, the "ghost" was not alone.

5. Indictments.

Based in part upon the evidence obtained through the "roving bug", indictments were returned, both in this case and in a separate case in the United States District Court for the District of

Massachusetts. United States v. Ferrara, 771 F. Supp. 1266 (D. Mass.). In Ferrara, seven defendants, including Raymond J. Patriarca, Joseph A. Russo, Vincent Ferrara, Robert Carrozza, Carmen Tortora, Dennis Lepore, and Pasquale Barrone, were charged in a superseding indictment filed on March 22, 1990, with being part of a secret enterprise, the Patriarca family, whose illegal activities included specific murders, drug trafficking, extortion, obstruction of justice, gambling, and other crimes. In the present case, Nicholas L. Bianco, Louis R. Failla, Americo Petrillo, Gaetano J. Milano, Salvatore D'Aquila, Jr., Frank A. Pugliano, and Louis Pugliano were charged in a superseding indictment filed December 7, 1990 with the same types of crimes as were charged in Ferrara.

6. Suppression Motions.

A principal pretrial issue in both cases was the admissibility of the "roving bug" tape recording of the LCN induction ceremony. The tapes captured the voices of two defendants in this case, Milano and Failla, and of four of the defendants charged in the Massachusetts indictment.

Motions to suppress the recordings of the ceremony were filed in both the Massachusetts case and this Connecticut case. On April 15, 1991, the Massachusetts district court (Wolf, J.), after extensive hearings, ruled the tape recordings admissible. Ferrara, 771 F. Supp. 1266. On April 19, 1991, the Connecticut district court (Nevas, J.) denied both the defendants' requests for an independent evidentiary hearing in

this case and their motions to suppress. In denying the suppression motions, Judge Nevas [*1120] adopted Judge Wolf's findings of fact and conclusions of law in their entirety.

Judge Wolf had found that the government, in applying for the "roving bug" order, had violated its statutory obligation to make a "full and complete statement" as to why specification of the place where interceptions would occur was not practical. Ferrara, 771 F. Supp. at 1273, 1278-80. Specifically, the government knew, but failed to disclose to Judge Nelson, the following: (1) confidential informants had stated that an LCN induction ceremony was planned to take place near Wellington Circle in Medford, Mass., at 11:00 a.m., on October 29, 1989; (2) Vincent Federico, a person

whom the FBI suspected was to be inducted into the Patriarca family at the anticipated ceremony, had applied for a 28-hour furlough from the Massachusetts prison where he was confined, to begin Sunday morning, October 29, 1989; (3) Federico sought permission to be at 34 Guild Street, Medford, Mass. (his sister's residence) between 11:30 a.m. to 2:30 p.m. on the 29th; (4) because of the above information, the FBI had already set up visual surveillance of 34 Guild Street on October 27; and (5) about six hours before Kottmyer appeared before Judge Nelson, FBI agents saw two of the "roving bug" targets, capos Russo and Ferrara, emerge from 34 Guild Street and drive away in Federico's brother-in-law's car.

Based on these facts, Judge Wolf concluded that the government had failed to disclose to Judge Nelson that it had probable cause to believe that the conversations it wanted to intercept would occur on a particular date, October 29, 1989, and at a particular location, 34 Guild Street. The defendants argue that had these facts been disclosed, Judge Nelson would have been able to issue a standard Title III order to bug 34 Guild Street, rather than authorize the far broader "roving bug" interception.

While Judge Wolf concluded that the government had violated the roving-intercept provision of the electronic-surveillance statute by not telling Judge Nelson of a possible induction ceremony at 34 Guild Street, he also held that the

affiant had acted in complete good faith, that her error was not made in reckless disregard for the truth or for the government's other obligations to the court, and that a fully informed judge would nevertheless have authorized the electronic surveillance at that address. Ferrara, 771 F. Supp. at 1280. He therefore denied the motion to suppress.

After reviewing the parties' submissions, the supplemental affidavits, a transcript of prosecutor Kottmyer's testimony, applicable case law, and Judge Wolf's opinion, Judge Nevas, the district judge in this case, adopted Judge Wolf's order "in its entirety" and similarly denied the suppression motion.

7. Issues on Appeal.

Defendants argue (a) that § 2518(11)(a), the "roving bug" provision, is unconstitutional because it violates the particularity requirement of the fourth amendment; (b) that the "roving bug" order issued under the statute was unconstitutional in failing to protect defendants' fourth-amendment interests; and (c) that the order was deficient because the government failed to disclose certain relevant information to the court in its application for the order. For any or all of these reasons, according to defendants, the recording of the LCN induction ceremony should have been suppressed.

(a) Constitutionality of § 2518(11)(a).

One of defendants' principal arguments challenges the constitutionality of 18 U.S.C. § 2518(11)(a). That section permits, in narrow situations, an order authorizing "roving" surveillance of oral conversations, i.e., interception of conversations without specifying in advance the place where the interception is to occur. Since the constitutionality of a statute is a legal issue, our review is de novo. United States v. Murphy, 979 F.2d 287, 289 (2d Cir. 1992).

In 1968 congress sought to enact a statute that would properly protect the privacy of oral and wire communications, while providing a uniform basis for authorizing their interception in appropriate cases. S. Rep. No. 1097, 90th Cong., 2d Sess. 2, reprinted in 1968 U.S.C.C.A.N. 2112, 2157. With those

concerns in mind, congress enacted Title III of the Omnibus Crime Control and Safe [*1121] Streets Act of 1968 ("Title III"). Pub. L. No. 90-351; 82 Stat. 217.

"The major purpose of Title III [was] to combat organized crime." S. Rep. No. 1097, reprinted in 1968 U.S.C.C.A.N. at 2157. It limits the scope of electronic surveillance by (1) requiring probable cause as to person, crime, conversation, and place or facility of communication, 18 U.S.C. §§ 2518(1)(b), 3(a), 3(b), 3(d), 4; and (2) limiting the duration of surveillance to thirty days. 18 U.S.C. § 2518(b). Surveillance that is properly authorized and carried out under Title III complies with the fourth amendment. See, e.g., United States v. Figueroa, 757 F.2d 466, 472 (2d Cir.), cert. denied,

474 U.S. 840, 88 L. Ed. 2d 100, 106 S. Ct. 122 (1985).

As originally enacted, Title III required that each application for electronic surveillance also include: (1) "a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted"; and (2) a showing of probable cause for belief that this location will be used in connection with an offense. 18 U.S.C. §§ 2518(1)(b)(ii), 2518(3)(d). Under that version of the statute, the surveillance conducted in this case could not have been authorized, because the agents did not have sufficient advance notice of the place.

In 1986, however, congress expanded Title III through the Electronic Communications Privacy Act, Pub. L. No.

99-508, 100 Stat. 1848 (1986), to "update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies." S. Rep. No. 541, 99th Cong. 2d Sess. 32, reprinted in 1986 U.S.C.C.A.N. 3555. Under one of the amendments congress added a new § 2518(11), which authorizes the kind of "roving" electronic surveillance used in this case. Subsection (a) relates to the interception of an oral communication such as occurred in this case, and subsection (b) applies to the interception of a wire or electronic communication.

Section (11)(a) reads as follows:

(11) The requirements of subsections (1)(b)(ii) and (3)(d) of this section relating to the specification of the facilities from which, or the place where

the communication is to be intercepted do not apply if-

(a) in the case of an application with respect to the interception of an oral communication-

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted;

(iii) the judge finds that such specification is not practical * * * . 18 U.S.C. § 2518(11)(a).

Thus, § 2518(11)(a) permits an oral-interception order without specifying the place of surveillance and without a showing of probable cause for belief that the place will be used in connection with an offense if: (1) the application is by a federal officer and is approved by a

high federal official; (2) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and (3) the judge finds that specification is not practical. 18 U.S.C. § 2518(11)(a)(i)-(iii). Moreover, interceptions may not begin "until the * * * place where, the communication is to be intercepted is ascertained by the person implementing the interception order." 18 U.S.C. § 2518(12).

All other requirements of Title III -- including duration, minimization, sealing, custody, exhaustion of other investigative techniques, and limitation to the crimes that may be investigated through the use of electronic

surveillance -- apply as well to a "roving bug". In this case, the district court judge who issued the order placed an additional restriction upon the government -- that he be informed of any surreptitious entry by the [*1122] agents in advance if possible, and if not possible, then after the entry was completed.

Section 2518(11) has been interpreted by United States courts only three times before this case. See United States v. Petti, 973 F.2d 1441 (9th Cir. 1992) (warrant authorizing wiretap surveillance pursuant to § 2518(11)(b) met particularity requirement of fourth amendment), cert. denied, 123 L. Ed. 2d 480, 113 S. Ct. 1859 (1993); United States v. Silberman, 732 F. Supp. 1057 (S.D. Cal. 1990) (affirmed in relevant

part by Petti); Ferrara, 771 F. Supp. 1266 (roving electronic surveillance provision of § 2518(11)(a) held constitutional as applied). Careful analysis is therefore necessary. We will now consider (1) the problem of standing, (2) the particularity requirement, and (3) our final conclusion as to constitutionality.

(1) Standing.

Intercepted conversations from the 34 Guild Street induction ceremony were introduced against all the defendants at trial. None of the defendants claims any proprietary or possessory interest in the house, and only defendants Milano and Failla were present when the recording was made. Given these circumstances, the government contends that only Milano and

Failla have standing to challenge the roving order, and that none of the defendants has standing to challenge the surreptitious entry into the house at 34 Guild Street.

We have previously denied standing to defendants who seek to challenge electronic surveillance that occurred while they were at another's home. See United States v. Gallo, 863 F.2d 185, 192 (2d Cir. 1988) (Title III suppression provisions to be construed in accordance with standing requirements of fourth amendment; defendants lacked standing to claim minimization violation regarding electronic surveillance at another's home), cert. denied, 489 U.S. 1083, 103 L. Ed. 2d 843, 109 S. Ct. 1539 (1989); United States v. Fury, 554 F.2d 522, 526

(2d Cir.) (same), cert. denied, 433 U.S. 910 (1977).

While those cases dealt with a location-based surveillance statute, rather than with the person-based surveillance statute at issue here, we see no reason to depart from the general principle that standing to assert a fourth-amendment challenge requires a closer connection to the intrusion than merely being adversely affected by the use of its fruits at trial. We conclude that those defendants who were not present lack standing to challenge the interception. See United States v. Bynum, 513 F.2d 533, 535 (2d Cir.) (co-conspirators whose conversations were not intercepted, and who have no possessory interest in the premises subjected to electronic surveillance, lack standing),

cert. denied, 423 U.S. 952, 46 L. Ed. 2d 277, 96 S. Ct. 357 (1975). In other words, only Milano and Failla have standing to contest the order itself.

Since none of the defendants had any legitimate interest in the privacy of the 34 Guild Street residence before they arrived there, they lack standing to assert that the entry to install listening devices injured their rights. See United States v. Volpe, 430 F. Supp. 931, 945 (D. Conn. 1977), aff'd, 578 F.2d 1372 (2d Cir. 1978), cert. denied, 441 U.S. 930, 60 L. Ed. 2d 658, 99 S. Ct. 2049 (1979).

(2) Particularity.

The defendants contend that "the 1986 amendment to Title III, no matter how it is read does away with the particularity

requirement of the Fourth Amendment and is an unconstitutional exercise of Congressional power." U.S. Const. Amend. IV.

The warrant clause of the fourth amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Its purpose was to prevent general searches. Limiting any search authorization to specific areas and things for which there is probable cause ensures that the search "will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." Silberman, 732 F. Supp. at 1061 (quoting Maryland v.

Garrison, 480 U.S. 79, 84, 94 L. Ed. 2d 72, 107 S. Ct. 1013 (1987)).

[*1123] If read literally, the fourth amendment would forbid a warrant that specifies no particular place for the search and leaves the location to be determined at a future time. The Supreme Court, however, has refused to apply the fourth amendment literally, preferring instead a flexible approach designed to keep pace with a technologically advancing society. See discussion Id.at 1061. It "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." Payton v. New York, 445 U.S. 573, 591, n.33 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980). In short, the fourth amendment's "prohibition against 'unreasonable

searches and seizures' must be interpreted 'in light of contemporary norms and conditions.'" Steagald v. United States, 451 U.S. 204, 217, n.10 68 L. Ed. 2d 38, 101 S. Ct. 1642 (1981).

Under its flexible interpretation, the Supreme Court in numerous cases has rejected the narrow shackles that might otherwise flow from a literal reading of the fourth amendment. See, e.g., United States v. Ross, 456 U.S. 798, 72 L. Ed. 2d 572, 102 S. Ct. 2157 (1982) (automobile searches); Michigan v. Tyler, 436 U.S. 499, 56 L. Ed. 2d 486, 98 S. Ct. 1942 (1978) (exigent circumstances); United States v. Brignoni-Ponce, 422 U.S. 873, 45 L. Ed. 2d 607, 95 S. Ct. 2574 (1975) [**36] (border search); Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) (stop and frisk);

Harris v. United States, 390 U.S. 234, 19 L. Ed. 2d 1067, 88 S. Ct. 992 (1968) ("plain view").

Section 2518(11)(a) specifically addresses some of the concerns expressed by the Supreme Court that warrants be particular; it requires a full and complete statement as to why a particular description of the location to be monitored is not practical. See 18 U.S.C. § 2518(11)(a)(ii). With regard to this section, congress cited an effort to thwart surveillance as an example of impracticality, stating:

The judge must find that the ordinary specification rules are not practical. Situations where ordinary specification rules would not be practical would

include those where a suspect moves from room to room in a hotel to avoid a bug or where a suspect sets up a meeting with another suspect on a beach or a field. In such situations, the order would indicate authority to follow the suspect and engage in the interception once the targeted conversation occurs.
S. Rep. No. 541, 99th Cong., 2d Sess. 32, reprinted in 1986 U.S.C.C.A.N. 3555, 3586.

Among the circumstances, therefore, in which congress intended the "roving bug" to be used was a situation, such as here, where the target is attempting to thwart surveillance. See Ferrara, 771 F. Supp. at 1289.

A "roving bug" order is analogous to the order under § 2518(11)(b) issued in Silberman. Silberman involved the

interception of wire-tapped conversations under § 2518(11)(b), which, unlike § 2518(11)(a), specifically requires "a showing of a purpose on the part of that person to thwart interception by changing facilities." See 18 U.S.C. § 2518(11)(b)(ii). The court in Silberman held that the statute was constitutional as applied, and that once a judge determines that the location of a possible search is being purposely changed by suspects in order to evade detection or interception by law enforcement agents, an order expanding the scope of the search is clearly justified to counteract the attempted evasion. Silberman, 732 F. Supp. at 1062. A similar relaxed particularity standard should apply to oral interceptions under § 2518(11)(a), particularly when (1)

congress cited an effort to thwart surveillance as an example of impracticality under § 2518(11)(a), and (2) the party attempting to evade detection is part of organized crime, which has always been one of the prime targets of Title III.

In addition, unlike other orders under Title III, which requires identification of the anticipated speaker only "if known", § 2518(1)(b)(iv), to satisfy the roving intercept statute, the person targeted for roving interception must be identified, and only conversation involving the specified individual may be intercepted. 18 U.S.C. §§ 2518(4)(c), 2518(11)(a)(ii).

The roving intercept statute also addresses the fourth amendment's requirement that the place to be searched

be particularly described [*1124] "by identifying that location in terms of where a specified individual engages in certain conversation." Ferrara, 771 F. Supp. at 1291. It requires that "interceptions will not begin until * * * the place where the communication is to be intercepted is ascertained." § 2518(12). Section 2518(11) (a)(ii) further provides for defining the place to be searched as the location at which the targeted person is discussing specified crimes. These requirements, when considered along with the other requirements of § 2518(11)(a) and Title III, are constitutionally sufficient to satisfy the particularity requirement of the fourth amendment.

(3) Final Conclusion as to Constitutionality of the Statute.

The interception of an oral conversation falls within the fourth amendment's protections, Berger v. State of New York, 388 U.S. 41, 51, 18 L. Ed. 2d 1040, 87 S. Ct. 1873 (1967), and capturing a conversation through the use of electronic devices is a "search and seizure". Id. "The underlying command of the Fourth Amendment is always that searches and seizures be reasonable * * * . The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'" New Jersey v. T.L.O., 469 U.S. 325, 337, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985).

Congress expressly recognized the importance of combatting organized crime as a major reason for enacting Title III. At the same time, congress imposed substantial conditions on the issuance of any order for electronic surveillance. When it turned to the "roving bug", congress added several more protections against arbitrary surveillance:

(1) It limited the number of people who may seek a roving oral intercept by requiring advance approval from certain high-ranking federal officials. 18 U.S.C. § 2518(11)(a) (i).

(2) It required "a full and complete statement" as to why specification of the place of interception is not practical. 18 U.S.C.§ 2518(11)(1)(ii).

(3) It required identification of the persons committing the offense and whose

conversations are to be intercepted. 18 U.S.C. § 2518(11)(a)(ii). In many cases, "such a limitation in fact protects the fourth amendment interests of innocent third-parties to an even greater extent than do the limitations imposed under a standard * * * order." Silberman, 732 F. Supp. at 1062.

(4) It permited actual interception of communications to begin only when the place where the communication is to be intercepted is ascertained by the implementing agent. 18 U.S.C. § 2518(12).

(5) It retained all of the requirements of Title III -- including duration, minimization, sealing, custody, exhaustion of other investigative techniques, and identification of the crimes that may be investigated through the use of electronic surveillance.

In short, the "roving bug" provision, when examined in light of the other limitations imposed under Title III, permits "no greater invasion of privacy than is necessary." Silberman, 732 F. Supp. at 1063 (quoting Katz v. United States, 389 U.S. 347, 355, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967)). Therefore, mindful not only of the grave law-enforcement purposes underlying § 2518, a s well as the constitutional need to protect against arbitrary governmental intrusions into the privacy of individuals, we conclude that the safeguards required by congress provide adequate protection to preserve the constitutionality of interceptions of oral conversations when authorized under 18 U.S.C. § 2518(11)(a). We therefore

reject defendants' constitutional challenge to the "roving bug" statute.

(b) Constitutionality of the Order.

Defendants also contend that even assuming the statute itself is constitutional, the provisions of the order issued in this case were inadequate to protect their constitutional interests. We disagree.

Judge Wolf's decision in Ferrara, adopted by Judge Nevas in this case, evaluated the order in light of law enforcement's obligation to combat organized crime as well as the need to provide constitutional safeguards [*1125] against invasion of privacy. Judge Wolf correctly held that (1) the search in this case was reasonable; (2) the decision to authorize surveillance

was made by an independent judge; (3) there was a strong showing of probable cause; (4) the order particularly described the thing to be intercepted -- conversations of specified individuals about particular criminal activities; and (5) the order adequately described the place to be searched as the location at which a targeted individual is discussing the specified crimes. Ferrara, 771 F. Supp. at 1292-96.

The order also contained "provisions to minimize the risk that the roving authority it granted could be abused." Id. at 1294. It required notice of any surreptitious entry in advance, if possible, or as soon as possible thereafter -- a procedure that provided the district judge with the opportunity to "revoke or revise the roving intercept

Order if he perceived that the government was attempting too many intrusions, or seeking interceptions at sensitive locations." Id. See also Dalia v. United States, 441 U.S. 238, 258, 60 L. Ed. 2d 177, 99 S. Ct. 1682 (1979). While the agents were unable to reach the district judge before entry, they did advise the judge within hours of the entry and before any interception began.

In addition, the order required the government to file seven-day progress reports with the judge. These reports would also provide the district court judge with information which he could use to revoke or revise the roving intercept order if he thought the government was abusing its authority.

Finally, the order satisfied the requirements of the warrant clause of the

fourth amendment in that it was based on a strong showing of probable cause to believe that the targets were engaged in some of the serious crimes targeted by Title III.

Therefore, application of the "roving bug" statute through the order in this case resulted in a search and seizure that was reasonable within the meaning of the fourth amendment.

(c) Failure to Disclose.

(1) Section 2518(11)(a)(ii): Impracticality.

All defendants claim that the fruits of the roving-intercept order should have been suppressed because of the government's failure to comply with §

2518(11)(a)(ii), which requires the government to provide a "full and complete statement as to why * * * such specification [of the place where the communication is to be intercepted] is not practical." Specifically, they contend that the government did not disclose the information it had regarding the possibility that 34 Guild Street would be the site of a Mafia induction ceremony. Defendants further argue that when a central provision of Title III is violated, 18 U.S.C. § 2515 requires that the resulting evidence be suppressed. They contend that the court should look directly to the exclusionary rule of the statute, rather than to focus on fourth-amendment considerations or a Franks analysis. See Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct.

2674 (1978). Under Franks and its progeny, if a search warrant contains a false statement or omission, and the defendant makes a substantial preliminary showing (1) that the false statement or omission was knowingly and intentionally, or with reckless disregard for the truth, included by the government in a search warrant affidavit, (2) that the information was material, and (3) that with the affidavit's false or omitted material aside, the affidavit's remaining content is insufficient to establish probable cause, then the fruits of the search must be suppressed. Franks, 438 U.S. at 155-56.

Title III contains its own exclusionary rule. It provides that no intercepted communications can "be received in evidence in any trial * * *

if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515. The specific grounds for exclusion under § 2515 are set forth in § 2518(10)(a). They are that: (i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval. 18 U.S.C. § 2518(10)(a).

The government claims that the statutory requirement of a "full and complete" statement [*1126] was not violated here, but argues that even if it were, (1) the Franks standard is applicable, and (2) under that standard the undisclosed information was immaterial, and the issuing judge would

have signed the order even with knowledge of the undisclosed material.

We agree with the district court's application of Franks and with its findings (1) that the defendants did not establish deliberate falsehood or reckless disregard for the truth by the government, and (2) that the nondisclosure of the 34 Guild Street information was immaterial.

When enacted in 1967, §§ 2515 and 2518(10)(a) were not intended "generally to press the scope of the suppression role beyond [then] present search and seizure law." S. Rep. No. 1097, 90th Cong., 2d Sess. 96 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2185; Scott v. United States, 436 U.S. 128, 139, 56 L. Ed. 2d 168, 98 S. Ct. 1717 (1978). At that time there was no good-faith or

other exception to the judicially crafted exclusionary rule for violations of the fourth amendment. Ferrara, 771 F. Supp. at 1299. By 1984, the Supreme Court in Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 , and in Franks, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674, had narrowed the circumstances in which to apply the exclusionary rule, and this left to the courts the dilemma of whether to apply the Franks standard to Title III cases.

Despite the existence of §§ 2515 and 2518 (10)(a), several courts, including this circuit, have applied a Franks analysis to alleged falsehoods or omissions in wiretap affidavits and applications under Title III. United States v. Ferguson, 758 F.2d 843, 848 (2d Cir.), cert. denied, 474 U.S. 841 (1985);

United States v. Mastroianni, 749 F.2d 900, 909 (1st Cir. 1984); United States v. Leisure, 844 F.2d 1347, 1357 (8th Cir.), cert. denied, 488 U.S. 932, 102 L. Ed. 2d 342, 109 S. Ct. 324 (1988); United States v. Ippolito, 774 F.2d 1482, 1485 (9th Cir. 1985).

Use of the Franks standard is consistent with the purposes of § 2515, which are "not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted [**48] also 'to protect the integrity of court and administrative proceedings.'" Gelbard v. United States, 408 U.S. 41, 51, 33 L. Ed. 2d 179, 92 S. Ct. 2357 (1972) (citation omitted). Nothing in the Franks standard goes

against the grain of these purposes. If anything, Franks enhances the protection of the defendants, by applying to the wiretap statute an important constitutional principle that has been accepted by all courts.

While the government should have disclosed to the court the information relating to 34 Guild Street, its failure to do so does not require suppression of the evidence in this case. As the district court properly found, the information was not essential for permitting the interceptions, because there was enough independent information of the nature of the suspects' crimes and their evasive methods to justify issuing the roving order, even without the information about 34 Guild Street. Moreover, even if the judge had been

advised of the anticipated induction ceremony at 34 Guild Street, the information would not have eliminated the need for a roving order, because the members of the enterprise were trying to avoid detection, and could easily have changed the location at the last minute. Therefore, we agree with the district court that under the Franks standard the government's failure to disclose information about 34 Guild Street did not require suppression of the intercepted conversations.

(2) Sections 2518(1)(c) and (1)(e): Other Procedures and Applications.

Milano claims that the government violated 18 U.S.C. § 2518(1)(c) (requiring the government to inform the judge whether other investigative

procedures have been tried and why they were unlikely to succeed) and § 2518(1)(e) (requiring the government to inform the judge of all previous applications for approval of interceptions involving any of the same persons involved in the application), and that the government's multiple violations of these disclosure provisions require suppression of the induction ceremony tape recordings.

[*1127] At the time it applied for the roving bug in the District of Massachusetts, the government had already applied for two other Title III warrants against two of the people named in its application to Judge Nelson: an application in the District of Massachusetts for a warrant for electronic surveillance of Milano's car

(the district court authorized the warrant); and an application in the District of Rhode Island for a roving intercept of Milano's co-defendant Nicholas Bianco (this application was submitted to the district court in Rhode Island simultaneously with the one submitted to Judge Nelson). In its application to Judge Nelson, the government informed him only of prior Title III applications naming Russo, Ferrara, and Carrozza, who were named as targets of the "roving bug" request, and did not mention the applications for surveillance of Milano and Bianco, who were not targets, but merely were mentioned in the affidavit.

Milano contends that the failure to disclose the Milano and Bianco surveillance applications constituted a

violation of § 2518(1)(c), the "necessity" requirement, under which the government must inform the judge "as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed." Judge Wolf rejected this claim, concluding that subsection (1)(c) requires "disclosure only of 'normal' non-Title III investigative techniques" and not other electronic surveillance. Ferrara, 771 F. Supp. at 1313. [**51] Applying Franks, Judge Wolf also held that even if § 2518(1)(c) had been violated, suppression would be inappropriate because the information was not material and was not omitted to mislead Judge Nelson. We agree.

Several circuits, including our own, have held that subsection (1)(c) refers

to non-electronic investigative techniques. See United States v. Torres, 901 F.2d 205, 231 (2d Cir. 1990) ("Section 2518[(1)(c)] 'is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.'") (quoting United States v. Kahn, 415 U.S. 143, 153, n.12 39 L. Ed. 2d 225, 94 S. Ct. 977 (1974)); United States v. Lambert, 771 F.2d 83, 91 (6th Cir.), ("All that is required is that the investigators give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate."), cert. denied,

474 U.S. 1034, 88 L. Ed. 2d 577, 106 S. Ct. 598 (1985); see also United States v. Uribe, 890 F.2d 554, 556 (1st Cir. 1989) [**52] (the government is required to "make a reasonable good faith effort to run the gamut of normal investigative procedure before resorting to means so intrusive as electronic interception of telephone calls.") (quoting United States v. Hoffman, 832 F.2d 1299, 1306-07 (1st Cir. 1987).

The legislative history of subsection 1(c) further confirms this view:

Normal investigative procedure would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the

infilitration of conspiratorial groups by undercover agents or informants. S. Rep. No. 1097, reprinted in 1968 U.S.C.C.A.N. at 2190.

Moreover, as Judge Wolf noted, the enactment of 18 U.S.C. § 2518(11) did not alter the requirements of subsection 1(c), Ferrara, 771 F. Supp. at 1313, although it did modify other subsections, e.g., (1)(b)(ii). If the 1986 amendments were intended to modify subsection (1)(c), then congress would have explicitly done so.

Nothing in the plain language of subsection (1)(c), in the legislative history, or in the case law indicates that the term "other investigative procedures" must include other electronic surveillance. We conclude, therefore, that Judge Wolf correctly held that the

government was not required by § 2518(1)(c) to disclose in its application the electronic surveillance matters concerning Bianco and Milano.

Milano also contends that the government violated § 2518(1)(e), which requires the government to inform the issuing judge of:

> [*1128] all previous applications * * * for approval of interceptions of wire, oral, or electronic communications involving any of the same persons * * * specified in the application. 18 U.S.C. § 2518(1)(e).

Since the duty to disclose prior applications under § 2518(1)(e) covers all persons named in the application and not just those designated as "principal targets", Judge Wolf properly found that the provision was violated. Ferrara, 771 F. Supp. at 1315. He additionally found (1) that subsection (1)(e) goes beyond the requirements of the fourth amendment;

(2) that it is therefore subject to the statutory exclusionary provisions of §§ [**54] 2515 and 2518(10); United States v. Donovan, 429 U.S. 413, 425, 50 L. Ed. 2d 652, 97 S. Ct. 658 (1977); (3) that subsection (1)(e) constitutes a non-central provision of Title III; (4) that the government's failure to comply with the requirements of subsection (1)(e) was in good faith and inadvertent error, and (5) suppression is neither permissible or appropriate. Ferrara, 771 F. Supp. at 1314. We agree with Judge Wolf's conclusions as well as with his application and analysis of Donovan and its progeny. Id. at 1314-17.

In Donovan, the Supreme Court considered a different "naming" subsection of 2518, 18 U.S.C. § (1)(b)(iv). That subsection required the

government to "name an individual if the government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations." Donovan, 429 U.S. at 428. The Court held that "naming" under that subsection was not a constitutional requirement, that it was subject to the exclusionary provisions of Title III, that it was deemed not to play a central, or even a functional, role in guarding against unwarranted use of wiretapping or electronic surveillance, and that the omission of names in that case was inadvertent and did not require suppression. Several courts have interpreted Donovan to mean that even a violation of subsection (1)(e) does not require suppression. See United States v.

Van Horn, 789 F.2d 1492, 1500 n.6 (11th Cir. 1986) (suppression not mandated by inadvertent noncompliance with § 2518(1)(e)), cert. denied, 479 U.S. 854, 93 L. Ed. 2d 123, 107 S. Ct. 190 (1986); see also United States v. Sullivan, 586 F. Supp. 1314, 1323 (D. Mass. 1984) ("It is difficult to see how suppression could be required for noncompliance with § 2518(1)(e) when it is not required for a violation of § 2518(1)(b)(iv).").

The evidence in this case demonstrates that the government believed that it was necessary to disclose prior applications concerning only the proposed targets of the "roving bug", that omission of the prior surveillance applications for Milano and Bianco was not intentional, but inadvertent, and that the omission did not require suppression of the

incriminating tape recordings. As the district court noted, "At the time that she [the prosecutor] made her judgment, the requirements of subsection (1)(e) as applied to a roving intercept application had not been addressed in any reported decisions." Ferrara, 771 F. Supp. at 1316. The district court did not err in denying suppression because of a violation of subsection (1)(e).

CONCLUSION

We hold that § 2518(11)(a) satisfies the particularity requirement of the fourth amendment; that the district court's order permitting surveillance with a "roving bug" was constitutional and valid; that the government's failure to disclose information about 34 Guild Street and prior surveillance

applications did not require suppression of the recording of the LCN induction ceremony; and that the evidence seized at Failla's house was not taken in violation of his fourth-amendment rights.

We have considered and rejected all other arguments raised by the defendants, both as to their convictions and their sentences. We therefore affirm the judgments of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of September one thousand nine hundred and ninety-three.

Present:

HON. GEORGE C. PRATT
HON. FRANK X. ALTIMARI
HON. GERALD W. HEANEY*
CIRCUIT JUDGES,

USA V. BIANCO Docket No. 91-1672L

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant GAETANO J. MILANO.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in

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*Hon. Gerald W. Heaney, Circuit Judge of the United States Court of Appeals for the eighth circuit, sitting by designation.

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the court,
ELAINE B. GOLDSMITH, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of September one thousand nine hundred and ninety-three.

Present:
HON. GEORGE C. PRATT
HON. FRANK X. ALTIMARI
HON. GERALD W. HEANEY*
CIRCUIT JUDGES,

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*Hon. Gerald W. Heaney, Circuit Judge of the United States Court of Appeals for the eighth circuit, sitting by designation.

USA V. BIANCO Docket No. 91-1672L

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant LOUIS R. FAILLA.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the court,
ELAINE B. GOLDSMITH,Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of October one thousand nine hundred and ninety-three.

Present:

HON. GEORGE C. PRATT
HON. FRANK X. ALTIMARI
HON. GERALD W. HEANEY*
CIRCUIT JUDGES,

USA V. BIANCO Docket No. 91-1672L

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*Hon. Gerald W. Heaney, Circuit Judge of the United States Court of Appeals for the eighth circuit, sitting by designation.

A petition for rehearing having been filed herein by Appellant NICHOLAS L. BIANCO

Upon consideration by the panel thereof, it is

Ordered that said petition be and it hereby is DENIED.

For the court,
ELAINE B. GOLDSMITH, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA)

V.) NO.: H-90-18 (AHN)

NICHOLAS BIANCO)

SECOND RULING ON ALL DEFENDANTS' MOTION TO SUPPRESS ELECTRONIC SURVEILLANCE

The nine defendants in this case were named in the third superseding, multi-count indictment, returned December

7, 1990, alleging various criminal acts by members and associates of the Patriarca organized crime family of La Cosa Nostra ("LCN"). On January 22, 1991, the court held a hearing on the defendants' numerous motions to suppress electronic surveillance.[1]

This ruling addresses the following motions:

A. Frank Pugliano:

Motion to Suppress Surveillance Pursuant to Title III Order of October 27, 1989 (M.B.D. No. 89-1015);[2]

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[1]The electronic surveillance was executed pursuant to the Wire and Electronic Communications Interception and Interception of Oral Communications Act, 18 U.S.C.§ 2510 et seq. (1988) (Title III).

[2]This motion was adopted by Salvatore D'Aquila ("D'Aquila"), Frank Colantoni ("Colantoni"), Gaetano Milano ("Milano") and Louis Failla ("Failla").

B. Matthew Guglielmetti:

Motion to Suppress Surveillance Pursuant to Title III order of October 27, 1989 (M.B.D. No 89-1015.[3]

The electronic surveillance the defendants seek to suppress was conducted pursuant to an Order issued October 27, 1989, by Judge David nelson of the United States District Court for the District of Massachusetts. The order was issued pursuant to an application filed by Special Attorney Diane Kottmyer. ("Kottmyer") and a supporting affidavit of Special Agent Walter J. Steffens, Jr., of the Federal Bureau of Investigation. The order authorized the government, pursuant to 18 U.S.C. § 2518 (11) (a), to use roving electronic surveillance to intercept certain criminal communications

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[3]This motion was adopted by Americo Petrillo, Milano, D'Aquila, Pugliano, Colantoni, and Failla.

involving Joseph Russo, Vincent Ferrara or Robert Carrozza. Pursuant to the Order, on October 29, 1989, at 34 Guild Street, Medford, Massachusetts, the government electronically intercepted and recorded a meeting during which new members of LCN were inducted.

The same issues presented by these motions were recently addressed in the District of Massachusetts before United States District Judge Mark Wolf, where the government sought to use the same evidence in the case of United States v. Ferrara, et al. (Cr. No. 89-289-WF). In Ferrara, Judge Wolf held oral arguments on the defendants' motions to suppress on February 22, 1991, February 26, 1991, February 27, 1991, March 6, 1991, March 14, 1991, and March 25, 1991. During the course of these hearings, the government

submitted several supplemental affidavits ("the supplemental affidavits") describing what it knew about the Guild Street location prior to the issuance of the Order. On March 25, 1991, counsel for the defendants were permitted to examine Kottmyer. On April 15, 1991, Judge Wolf issued a very comprehensive ruling in which he denied the motions to suppress. See Appendix to Ruling. At the conclusion of his learned, extremely thorough ruling, Judge Wolf held:

1. Section 2518 (11) (a) is constitutional as applied;

2. If the manner in which the order was obtained does not require suppression, the good faith exception to the judicially crafted exclusionary rule which applies to Fourth Amendment violations would operate to defeat defendants motions to suppress even if the roving intercept provision were deemed unconstitutional;

3. The government's failure to inform Judge Nelson of the information it developed on October 27, 1989, concerning

the possible use of 34 Guild Street for an imminent Mafia induction ceremony was a violation of § 2518 (11) (a) (ii), but suppression is not a proper remedy for this violation because: (1) the government did not intend to mislead the judge and did not act with reckless disregard for its obligations; and (2) if the omitted information had been disclosed, a reasonable judge would nevertheless have issued a roving warrant explicitly or implicitly authorizing electronic surveillance at 34 Guild Street.

4. The government was not, pursuant to § 2518 (1) (c), required to include in its application information concerning its efforts to intercept the communications of Bianco and Milano and, in any event, suppression would not be justified if a violation of § 2518 (1) (c) were found in this case.

5. The government's failure to disclose the prior applications for electronic surveillance for individuals named in the application in addition to Russo, Ferrara and Carrozza, constituted a violation of § 2518 (1) (e), but suppression is not a proper remedy for this violation;

6. The government was not required to name Raymond Patriarca, Jr., or any defendant similarly situated, as a target or principal in its application for a roving intercept, and its decision not to do so does not justify suppression; and

7. The imperfections in the government's conduct in this case do not individually or cumulatively justify suppression.

Had these same issues not been the subject of six days of hearings before Judge Wolf, the court would have conducted its own extensive hearing on the motions. See United States v. Squitieri, 688 F. Supp. 163 (D.N.J. 1988) (court adopted ruling were identical title III issues raised by defendants had already been addressed by several other judges in different districts). Indeed, the court would have applied the standards set forth in Franks v. Delaware, 438 U.S. 154 (1978). See e.g. United States v. Feola, 651 F. Supp. 1068, 1108 (S.D.N.Y 1987), aff'd, 875 F.2nd 857 (2d Cir.), cert. denied sub nom. Marin v. United States 110 S. Ct. 110 (1989) (court applied Franks to

assess motion to suppress title III electronic surveillance). Furthermore, Senior United States District Judge Clarie's holding in United States v. Gerena, 667 F. Supp. 926-7 (D. Conn. 1987), is persuasive: Electronic surveillance gathered under the supervisory authority of courts in one federal circuit and admissible in that circuit is also admissible in another federal circuit.

The court has carefully reviewed the parties' submissions, the supplemental affidavits, a transcript of the March 25, 1991, Kottmyer testimony, applicable case law and Judge Wolf's excellent ruling. the court adopts Judge Wolf's order in its entirety and is filing his order. Accordingly, the court denies Frank Pugliano's motion to suppress

surveillance pursuant to the title III order of October 27, 1989, (M.B.D. No. 89-1015) (Adopted by D'Aquila, Colantoni, Milano and Failla)) and the court denies Guglielmetti's motion to suppress surveillance pursuant to the title III order of October 27, 1989 (M.B.D. no. 89-1015) (adopted by Petrillo, Milano, D'Aquila, Frank Pugliano, Colantoni and Failla).

SO ORDERED this 19th day of April, 1991 at Hartford, Connecticut.

Alan H. Nevas
United States District Judge

APPENDIX F

ORDER AUTHORIZING INTERCEPTION OF ORAL COMMUNICATIONS

Application under penalty of perjury having been made before me by Diane M. Kottmyer, an investigative or law enforcement officer as defined in Section

2510(7) of Title 18, United States Code, for an order authorizing the interception or oral communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

1. There is probable cause to believe that JOSEPH A. RUSSO, VINCENT M. FERRARA, ROBERT F. CARROZZA, Gaetano Milano, Louis Failla, John Castagna, Frank Pugliano, John Farrell and others as yet unknown have been and are now committing offenses and are conspiring to commit, and will commit, offenses involving the conducting of one or more illegal gambling businesses in violation of 18 U.S.C. §§ 1955 and 371.

2. There is probable cause to believe that JOSEPH A. RUSSO, VINCENT M. FERRARA,

ROBERT F. CARROZZA, Raymond J. Patriarca, Nicholas L. Bianco, Matthew L. Guglielmetti, Jr., Gaetano Milano, Louis Failia, John Castagna, John Farrell, Frank Pugliano, and others as yet unknown have been and are now committing offenses, and are conspiring to commit, and will commit, offenses involving travel and the use of wire facilities in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management and carrying on of unlawful activities and distributing the proceeds thereof, said unlawful activities being business enterprises involving gambling in violation of state law, and thereafter performing and attempting to perform such acts, in violation of 18 U.S.C. §§ 1952 and 371.

3. There is probable cause to believe that JOSEPH A. RUSSO, VINCENT M. FERRARA, ROBERT F. CARROZZA, Angelo Mercurio, Frank Imbruglia, Frank Pugliano, Gaetano Milano, Louis Failla and others as yet unknown have committed murder in violation of state law for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity and are conspiring to do the same in violation of 18 U.S.C. § 1959.

4. There is probable cause to believe that JOSEPH A. RUSSO, VINCENT M. FERRARA, ROBERT F. CARROZZA, Angelo Mercurio, Frank Imbruglia, Raymond J. Patriarca, Nicholas L. Bianco, Matthew L. Guglielmetti, Jr., Gaetano Milano, Frank Pugliano, Louis Failla, John Castagna, John Farrell, and others as yet unknown

are employed by or associated with an enterprise engaged in, or the activities of which affect, interstate or foreign commerce, and have been and will continue to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity and are conspiring to commit said violations, in violation of 18 U.S.C. § 1962.

5. There is probable cause to believe that particular oral communications made by, directed to, and/or in the presence of JOSEPH A. RUSSO, VINCENT M. FERRARA and ROBERT F. CARROZZA, concerning the subject offenses set forth above, will be obtained through interception of oral communications at various and changing locations. These communications are expected to constitute admissible

evidence of the commission of the foregoing offenses. In particular, these oral communications will concern:

(a) The precise nature, scope and extent of the gambling businesses, including the roles of the principals, the identities of the individuals who conduct, manage, supervise, direct or own all or part of the businesses, their length of continuous operation, the methods for settling of accounts and the existence and location of records of the businesses, the dissemination of information relating to planned illegal gambling events, orders and instructions to subordinates and associates, the distribution of gambling proceeds to and from the State of Massachusetts and elsewhere, the collection of debts, and conversations relating to the

administration, conduct and management of the gambling businesses. The communications may also provide evidence of overt acts committed in furtherance of the conspiracy and of the extent of each aider's, abettor's and co-conspirator's knowledge of the criminal activities of the principals.

(b) The precise nature, scope and extent of the interstate travel or use of wire facilities in interstate commerce which are being used to promote, manage, establish, carry on and facilitate the promotion, management and carrying on of the unlawful gambling businesses and the distribution of the proceeds thereof, and thereafter performing and attempting to perform said acts. The communications may also provide evidence of overt acts committed in furtherance of the

conspiracy and of the extent of each aider's, abettor's and co-conspirator's knowledge of the criminal activities of the principals.

(c) The precise manner and means used to commit murder in violation of state law for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, the circumstances surrounding the murder of William Grasso, the identitity and role of individuals involved in the planning and carrying out of the murder and the disposal of Grasso's body, and the motive for the murder of Grasso. The communications may also provide evidence of overt acts committed in furtherance of the conspiracy and of the extent of each aider's, abettor's and co-conspirator's

knowledge of the criminal activities of the principals.

(d) The precise roles of JOSEPH A. RUSSO, VINCENT M. FERRARA, ROBERT F. CARROZZA, Angelo Mercurio, Frank Imbruglia, Raymond J. Patriarca, Nicholas L. Bianco, Matthew W. Guglielmetti, Jr., Gaetano Milano, Frank Pugliano, Louis Failla, John Castagna, John Farrell, and others as yet unknown in the enterprise, including the degree of their conduct or participation, the nature of their association to the enterprise, the degree of the effect of the enterprise on interstate or foreign commence, the precise details of the management of the enterprise, and the precise details of the pattern of the racketeering activity.

6. It is not practical to specify each of the locations at which such oral

communications will be intercepted in connection with the commission of the above stated offenses.

7. Normal investigative techniques either have been tried without success or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

WHEREFORE, IT IS HEREBY ORDERED that Special Agents of the Federal Bureau of Investigation are authorized, pursuant to an application authorized by the Acting Assistant Attorney General for the Criminal Division, United States Department of Justice, the Honorable John C. Keeney, to intercept oral communications made by, directed to, and/or in the presence of JOSEPH A. RUSSO, VINCENT M. FERRARA, and/or ROBERT F. CARROZZA, concerning the above

described offenses, at such various and changing locations.

Such interceptions shall not automatically terminate when the types of communications described above in paragraph (5) have first been obtained, but shall continue until communications are intercepted that reveal the manner in which RUSSO, FERRARA, CARROZZA, their listed co-conspirators and others as yet unknown, participate in the specified offenses, and that reveal the identities of RUSSO's, FERRARA's, and CARROZZA's co-conspirators, their places of operation and the nature of the conspiracies involved therein, or for a period of thirty (30) days, whichever is earlier; pursuant to Section 2518(5) of Title 18, United States Code, the time set forth in this Order shall run from the earlier of

the day on which the investigative or law enforcement officer shall first begin to conduct the interception or ten days from the date of this Order.

It is further ORDERED that Special Agents of the Federal Bureau of Investigation are authorized to enter premises surreptitiously for the purposes of installing, maintaining, repairing and removing any electronic oral interception devices utilized pursuant to the authority granted by this order, providing where feasible, Applicant shall notify the Court in advance of such surreptitious entry. Where notification in advance is not feasible, Applicant shall notify the court as soon possible after the fact of the location and circumstances of the entry.

It if further ORDERED that this authorization to intercept oral communication shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize personal and privileged communications and communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code. No interception of oral communications shall be conducted unless it is determined through physical surveillance or by other means that one or more of the named interceptees is present when the conversation to be intercepted is taking place. This authorization must terminate upon attainment of the authorized objective or, in any event, at the end of thirty (30) days, measured from the

earlier of the day on which an investigative or law enforcement officer first begins to conduct the interception or ten days from the date of the Order.

It is further Ordered pursuant to 18 U.S.C. § 2518(8)(d), that no inventory or return of the results of this electronic surveillance and interception be made before ninety (90) days from the date of the expiration of this Order and any extension thereof and that upon any ex parte showing of good cause to a judge of competent jurisdiction, the service of the above-mentioned inventory or return be postponed for a further reasonable period of time.

It is further ORDERED that Applicant shall provide the Court with a report on or about the seventh (7th), fourteenth (14th), twenty-first (21st) and twenty-

eighth (28th) days following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

/s/ David S. Nelson
United States District Judge

Date: October 27, 1989
Time: 6:25 p.m.

APPENDIX G

UNITED STATES OF AMERICA)

V.) NO.: H-90-18 (AHN)

NICHOLAS BIANCO)

THIRD CONSOLIDATED RULING ON PENDING MOTIONS

* * * *

D. Motions to Suppress

1. Failla's Motion to Suppress

Failla moves to suppress allitems seized on January 9, 1990, during the search of his residence at 58 Cloverdale

Drive, East Hartford, Connecticut. Failla presents two arguments in support of his motion. First, he argues that the warrant application failed to set forth probable cause. Second, he contends that the warrant failed to describe the property to be seized with particularity. A suppression hearing was held on February 19, 1991. Based on testimony, counsels' arguments and written submissions, the court denies Failla's motion to suppress.

a. Facts[10]

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[10]Rule 12 (e), Fed. R. Crim. P., requires the court to "state its essential [factual] findings on the record." In constructing these findings, the court relies on the credible testimony of the witnesses who appeared at the evidentiary hearing, the exhibits introduced in evidencem and the parties' submissions. Testifying for the government were Special Agent William Hutton ("Hutton") of the Federal Bureau of Investigation ("FBI") and Special

(continued...)

1. On January 8, 1990, Chief Judge Ellen B. Burns signed a search warrant authorizing the search of Failla's residence at 58 Cloverdale Drive, East Hartford, Connecticut.

2. The search warrant application was sworn to by Special Agent Richard T. Roberts ("Roberts") of the FBI.

3. The search warrant directed agents of the FBI to search the Failla residence, and a small shed outside the residence, and to seize "notes, ledgers, envelopes, papers, and records containing initials, names, addresses, dollar amounts, codes, figures, and the like: United States currency."

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[10](...continued)
Agent Harold Brantley ("Brantley") of the FBI. Failla called no witnesses. Neither Failla nor the government sought transcription of the hearing and thus there are no references to transcript pages inthe court's ruling.

4. The Roberts affidavit set forth portionsof four conversations involving Failla that were intercepted pursuant to court-authorized electronic surveillance.

5. During a conversation recorded August 24, 1989, Louis Failla told his son Mark and Jack Farrell about having "a lot of money on the street." In response to the question '[h]ow do you keep track of who owes you what", Failla stated: "Got to keep a book. I got a little ledger at home." He also stated: "You write everything down. All you got to do is stick it in one of these papers."

6. During a conversation recorded September 1, 1989, Failla told Farrell that the "juice is working." After explaining how certain loan transactions work, Louis Failla stated: "That's the proper way to shylock."

7. During a conversation recorded September 12, 1989, Failla gave his son Mark instructions on what Mark should do in the event Failla died. Failla told his son that "Mama has been keeping an envelope"; that "I got all the names written down"; that "[I] [g]ot twenty-eight thousand on the street"; that "I got all the names written down ... I am going to put a major list away for you and if anything happens, you gotta know what to do. You got to go get the money! You got to go to the wiseguys or go get it yourself ..."

8. The phrase "money out on the streets" generally is understood by law enforcement officers as a so-called "shylock loan" in which the borrower is required to make weekly interest payments known as "juice". The term "wiseguys" is

commonly used when referring to members and associates of La Cosa Nostra, or the Mafia.

9. A confidential informant (CI) advised the FBI that Failla was known on the Hartford area as a person who was engaged in the business of loansharking, and provided details concerning one Hartford area individual who owed Failla fifteen thousand dollars.

10. Special Agent Hutton supervised the search of 58 Cloverdale Drive on January 9, 1990. Special Agent Hutton read the search warrant and supporting papers prior to executing the search. The search of the residence took approximately two hours and involved seven t eight agents. Special Agent Hutton testified that, during the execution of the search, the other agents

brought items to him and he decided whether to seize and catalogue the items. Special Agent Hutton testified that he was looking for evidence related to extrotionate credit transactions and that it was his understanding that the warrant authorized only the seizure of notes, books, and ledgers containing numbers and figures.

11. Special Agent Brantley participated in the search of 59 Cloverdale Drive on January 9, 1990. He investigated Failla's criminal activities during the six to eight months prior to the search and was aware of the electronic surveillance cited in the Roberts affidavit. Immediately prior to the search, Special Agent Brantley read the search warrant and supporting papers and was briefed by Special Agents Roberts

and Hutton concerning the nature of the items to be seized.

12. The return of the search warrant describes the items seized from Failla's residence. The items include: (1) a blue address book; (2) Failla's passport; (3) two sheets of paper (containing numbers and names); (4) a July 29, 1984 copy of the New Haven Register (containing an article on the criminal activities of the late William Grasso); (5) a metal box containing three-by-five cards (on which were written numbers and names); (6) three address books; (7) a 1990 calendar; (8) five safe-deposit keys; and (9) an address book.

b. Discussion.

* * * *

(ii) Particularity

Failla's second argument in support of his motion to suppress is that the warrant authorized an unconstiutionally broad seizure. Specificaly, Failla contends that none of the particularity commonly found in search warrants -- such as the words "which are evidence of violations of 18 U.S.C. § 994" -- limited the search. Thus, Failla claims that the warrant authorized the seizure of "everything from the family Bible to love letters." The court disagrees.

The particularity requirement of the Fourth Amendment serves three related purposes: preventing general searches, preventing the seizure of objects upon the mistaken assumption that they fall within the magistrate's authorization, and preventing the issuance of warrants without a substantial factual basis.

United States v. Young, 745 F.2d 733, 759 (2d Cir.), cert. denied, 470 U.S. 1084 (1984). The particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized. Furthermore, the character of the items to be seized pursuant to a warrant controls, to a large extent, the degree of specificity required in describing them. See United States v. Lowry, 675 F.2d 593, 595 (4th Cir. 1982); United States v. Timpani, 665 F.2d 1, 5 (1st Cir. 1981).

Here, the warrant described the property to be seized as:

> NOTES, LEDGERS,
> ENVELOPES, PAPERS,
> AND RECORDS
> CONTAINING INITIALS,
> NAMES, ADDRESSES,
> DOLLAR AMOUNTS,
> CODES, FIGURES, AND
> THE LIKE: UNITED
> STATES CURRENCY.

The terms "ledger", "envelope", "paper", and "money" were terms Failla used when describing his "shylocking" records. The other two terms, "notes" and "records," were the equivalent of descriptions used by Failla ("you write down everything" and "got to keep a book".) The warrant's list of items to be seized was precise, limited and as detailed as possible under the circumstances. See National City Trading Corp. v. United States, 635 F.2d 1020, 1026 (2nd Cir. 1980). Furthermore, the descriptions used in the warrant are more narrow than descriptions that have been upheld in other cases. See United States v. Kepner, 843 F.2d 755, 757 (3rd Cir. 1988 ("documents, records and personal effects"); United States v. Dennis, 625 F.2d 782, 792 (8th Cir. 1980) ("certain books and records relating to

the extortionate credit transaction business").

Most important, however, is what occurs when the warrant is considered in connection with its supporting application and affidavit: the ambiguities that Failla points to disappear. The application states that the items concealed at the Failla residence are evidence of a violation of 18 U.S.C. § 894 and 1962, and the supporting affidavit details the loansharking business and Failla's reference to his record-keeping.

The Second Circuit addressed the issue of the degree to which an affidavit may be used to supplement the particularity of a warrant in United States v. Marti, 421 F.2d 1263, 1298 (2nd Cir. 1970), cert. denied, 404 U.S. 947

(1971). In Marti several search warrants directed the executing officers to seize "any materials found by them to be in violation of the New York obscenity laws." Marti, 421 F.2d at 1268. The government argued that the generality of the warrant was cured by the specificity of the supporting affidavit. The court struck down the warrant, citing the great "dangers inherent" in a general search that implicated the defendants' First Amendment rights.

The holding in Marti reflects the Second Circuit's recognition that "where the First Amendment is implicated, more stringent limitations on obtaining and executing a search warrant consistently with the Fourth Amendment are imposed." United States v. Bonfiglio, 713 F.2d 932, 939 (2nd. Cir. 1983). Indeed, in

Stanford v. Texas, 379 U.S. 476, 485 (1965), the Supreme Court held that a heightened degree of specificity in a search warrant's description of "things to be seized" is required where the subject materials "are books, and the basis for their seizure are the ideas which they contain." In contrast, where the "special problems associated with the First Amendment are not involved ... more 'reasonable particularity' is permissible." Berger v. New York, 388 U.S. 41, 98 (1967).

In the instant case, the court holds that the affidavit may be referred to in considering particularity claims. See United States v. Wuggneux, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983) (affidavit in support of search warrant can be used to cure

ambiguities in the warrant); United States v. Zanche, 541 F.Supp. 207, 213 (W.D.N.Y. 1982) ("it was also proper to examine the affidavit in deciding the degree of specificity required in the warrant"). In fact, Special Agents Hutton and Brantley testified that they were familiar with the content of the affidavit and understood the limitations of the search warrant. And the court now is not turning to the affidavit in order to enhance the restrictions of the warrant. The court examines the warrant in the context of the affidavit and concludes that the warrant fully satisfied constitutional requirements. Accordingly, Failla's motion to suppress is denied.

SO ORDERED this 14th day of March, 1991 at Hartford, Connecticut.

Alan H. Nevas
United States District Judge